Public Document No. 12

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

Year Ending June 30, 1976

PUBLICATION OF THIS DOCUMENT APPROVED BY ALFRED C. HOLLAND, STATE PURCHASING AGENT
1500-8-77-142375
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The Commonwealth of Massachusetts

Boston, July 12, 1977

To the Honorable Senate and House of Representatives:

I have the honor to transmit herewith the report of the Department of the Attorney General for the year ending June 30, 1976.

Respectfully Submitted,
FRANCIS X. BELLOTTI
Attorney General

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

Attorney General
FRANCIS X. BELLOTTI

First Assistant Attorney General
Robert M. Bonin

Assistant Attorneys General

James R. Adams [15]
Phyllis H. Allen
Nicholas P. Arenella
Kenneth M. Barna
W. Channing Beucler
Margot Botsford
Jonathan Brant
James A. Clayton, Jr. [1]
Garrick F. Cole
John P. Corbett [2]
Kathleen Ryan Dacey
Maureen Dewan [4]
Paul Donaher
Michael C. Donahue
Eleanor A. Dwyer
Michael Eby [14]
Catherine Farrell
Lisa Fitzgerald [5]
Charles P. Gamer
Brian F. Gilligan
Paula W. Gold
Joseph P. Gordon, Jr. [6]
Robert V. Greco
William F. Green [4]
Richard A. Gross
Patricia C. Gunn [7]
L. Scott Harshbarger
William E. Howell
John F. Hurley
John J. Irwin
Carolyn A. Kelliher [7]
Thomas M. Kiley [12]
Thomas R. Kiley
Dennis LaCroix [11]
Timothy J. Lane, Jr.
Steven M. Leonard
William F. Linnehan
Bernard Manning
Andrew J. McElaney, Jr. [1]
Barton J. Menitove
Michael B. Meyer
Stephen Miller [9]
Thomas H. Miller [2]
David A. Mills [9]
Anton T. Moehrke [7]
John T. Montgomery [7]
Henry F. O'Connell, Jr.
Terence P. O'Malley
Kathleen K. Parker [5]
Alan K. Posner
Paula Rosen
Steven A. Rusconi
S. Steven Rosenfeld
Barbara J. Rouse
Anthony P. Sager [8]
Frank J. Scharaffa
William A. Schroeder
Stephen Schultz
Marc S. Seigle
Terry Seligmann [3]
Paul W. Shaw [6]
Mitchell Sikora
Bruce Singal [10]
Susan K. Sloane
Barbara A. Smith
Deborah S. Solomon
Piroska Soos
Donald Stern
Paul J. Swartz
Terence M. Troyer [3]
Bruce D. Twyon [13]
Frank K. Upham
John J. Ward
Ellen R. Weiss
Wade M. Welch [9]
Howard Whitehead
Robert A. Williams [12]
Timothy J. W. Wise
Donald P. Zerendow
Stephen Ziedman

Assistant Attorney General; Director, Division of Public Charities
Francis V. Hanify

Assistant Attorneys General Assigned to Department of Public Works

Jerold E. Berman [9]
Elizabeth A. Bowen
Jacob Brier [12]
John P. Davey
Paul A. Good
Allan Gottlieb
James J. Haroules
Michael J. Marks
Michael J. McCormack
Leo S. McNamara
Edward J. McCormack III
Robert Mulligan
Howard R. Palmer
Joseph A. Pelligrino
Edward J. Quinlan
Richard Rafferty
T. David Raftery
Robert Rodophele
Herbert L. Schultz
John W. Spencer
John J. Twomey
Gerald Van Dam [9]
Christopher H. Worthington

Assistant Attorneys General Assigned to the Division of Employment Security

Joseph S. Ayoub
William D. Jackson

Chief Clerk

Russell F. Landrigan

Assistant Chief Clerk

Edward J. White

[1] Appointed July 1975
[2] Appointed August 1975
[3] Appointed September 1975
[4] Appointed November 1975
[5] Appointed December 1975
[6] Appointed January 1976
[7] Appointed February 1976
[8] Appointed June 1976
[9] Terminated September 1975
[10] Terminated November 1975
[11] Terminated December 1975
[12] Terminated January 1976
[13] Terminated March 1976
[14] Terminated May 1976
[15] Terminated June 1976

STATEMENT OF FINANCIAL POSITION
FOR FISCAL YEAR ENDED
JUNE 30, 1976

Account Number	*Account Name*	*Appropriation*	*Expenditures*	*Advances*	*Encumbrances*	*Balance*
			STATE FUNDS			
0810-0001	Administration	$3,728,863.07	$3,319,415.13	$3,455.31	$172,490.77	$233,501.86
0810-0014	Public Utilities: Authorized by Ch. 1224, 1973	392,803.90	192,252.50	-	51,474.43	149,076.97
0810-0100	LEAA Hard Cash Matching Funds	25,000.00	21,026.14	-	3,973.86	-
0821-0100	Settlement of Claims	50,000.00	42,955.82	-	7,044.18	-
	TOTAL STATE FUNDS	$4,196,666.97	$3,575,649.59	$3,455.31	$234,983.24	$382,578.83
			FEDERAL FUNDS			
0810-6613	Consumer Protection Research and Pilot Program	$ 7.78	$ -	$ -	$ -	$ 7.78
0810-6616	Drug Training Manual and Technical Assistance	2,163.21	2,163.21	-	-	-
0810-6619	Organized Crime Unit	1,076.50	540.00	-	-	536.50
0810-6621	Criminal Appellate Program	15,021.75	15,021.75	-	-	-
0810-6623	WIN Public Service Employment Program	347.00	347.00	-	-	-
0810-6624	Organized Crime Unit	43,353.03	42,420.76	-	-	932.27
0810-6625	Drug Intelligence Information System	1,260.35	1,260.35	-	-	-
0810-6626	Appellate Legal Services	108,477.10	81,599.73	-	-	26,877.37
0810-6627	Organized Crime Unit	55,865.00	43,062.90	-	-	12,802.10
0810-6628	Drug Intelligence Information Unit	31,030.00	31,008.77	-	-	21.23
0810-6629	Commission on the Legal and Civil Rights of the Developmentally Disabled	15,475.00	14,289.13	-	-	1,185.87
0810-6630	Water Pollution Control Program	56,000.00	26,121.58	-	-	29,878.42
0810-6631	Air Pollution Control Program	30,000.00	16,321.01	-	-	13,678.99
0810-6632	Attorney General Law Library	30,000.00	10,697.86	-	-	19,302.14
	TOTAL FEDERAL FUNDS	$ 390,076.72	$ 284,854.05	$ -	$ -	$105,222.67
	GRAND TOTAL	$4,586,743.69	$3,860,503.64	$3,455.31	$234,983.24	$487,801.50

STATEMENT OF AGENCY TRUST FUND ACCOUNTS
AS OF JUNE 30, 1976

Account Number	*Account Name*	*Total Available*	*Disbursements*	*Balance*
0810-6610	Attorney General Anti-Trust Settlements	$ 64,200.36	$ -	$64,200.26
0810-6701	Dexter Nursing Home	344.95	-	344.95
0810-6702	Pine Grove Park Mobile Home	21,690.99	21,690.99	0
0810-6703	Miami Vacations Inc. d/b/a Resort Hotel Association	905.05	36.00	869.05
0810-6704	Framingham Civil Service School, Inc.	15,000.00	14,983.82	16.18
0810-6705	Dante Gregorie d/b/a United Auto Buyers	4,000.00	-	4,000.00
0810-6706	Joe Fiori's Auto Sales	2,400.00	1,600.00	800.00
0810-6707	Mass. Business and Professional Directory	1,351.35	1,351.35	0
0810-6708	Mass. Rentals, Inc. d/b/a City Wide Rentals	5,000.00	4,545.00	455.00
0810-6709	Middleboro Auto Sales, Inc.	1,800.00	1,800.00	0
0810-6710	E & S Enterprises, Inc. d/b/a Belton Hearing Aid Service	1,500.00	-	1,500.00
0810-6711	Duddie's of Worcester, Inc. d/b/a Duddie Ford, Inc.	1,600.00	1,600.00	0
0810-6712	C. Murphy, W. Hartwick, Bird Inc., Univ. Bank & Trust	9,762.49	9,600.00	162.49
0810-6613	Figure Reducing Salons, Inc. d/b/a Lady Diane Figure Salon	1,081.00	-	1,081.00
Total Funds in Agency Trust Accounts		$130,636.09	$57,207.16	$73,428.93

DEPARTMENT OF THE ATTORNEY GENERAL
STATEMENT OF INCOME
FOR FISCAL YEAR ENDED
JUNE 30, 1976

Account Number		
0801-40-01-40	Fees - Filing Reports; Charitable Organizations	$55,222.00
0801-40-02-40	Fees - Registration; Charitable Organizations	5,567.00
0801-40-03-40	Fees - Professional Fund Raising Council or Solicitor	80.00
0801-62-02-40	Reimbursement for Services - Cost of Investigations	2,150.00
0801-69-99-40	Miscellaneous	573.17

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

Boston, July 12, 1977

To the Honorable Senate and House of Representatives:

Pursuant to the provisions of section 11 of chapter 12 of the General Laws, as amended. I herewith submit my report.

This Annual Report, my second as Attorney General of the Commonwealth, is submitted as required by Chapters 30 and 32 of the General Laws and covers the fiscal year from July 1, 1975 to June 30, 1976.

During the past year, I have redoubled my efforts to improve the administration of the office. Those efforts have taken several forms. First, the staff has been consolidated and, with the exception of the Division of Employment Security, all of the divisions of the Department have been relocated in a single building. Second, an independent Civil Service Management Survey was completed and staff salaries throughout the Department have been balanced based on the information provided by the survey. Third, we are in the process of developing a personnel manual as well as computerized docket control and consumer complaint systems. These improvements in management techniques have made it possible for us to develop new, programatic approaches to the legal problems of the Commonwealth while permitting us to maintain high standards of representation in our traditional functions.

One innovative program deals with the problems posed by violent crime. In conjunction with the Governor and the district attorneys, we have developed a program for the identification and prompt prosecution of violent offenders. A pilot project is in place in Norfolk County. In order to better assure a coordinated attack against all crime, a system has also been established whereby the district attorneys and local police provide me with information and intelligence concerning known or suspected criminal activity.

In the consumer field, this Department has identified the major areas of complaints and developed ongoing programs in each area. In addition, the Department has successfully encouraged over twenty-five local groups to form complaint handling organizations thus freeing personnel in this office to focus on broad-based, illegal trade patterns and practices.

One of my most important goals in the past year has been to establish a Department which acts to protect and aid the Commonwealth and its citizens rather than one which reacts to events and the influence of others. To further this goal, I have established a Division of Affirmative Litigation and undertaken strong programs of affirmative litigation and investigation in the fields of consumer and environmental protection. In addition, and maybe even of more importance, I have tried to encourage and instill in the Department's staff an attitude of taking strong, aggressive positions to protect the collective and individual rights of the Commonwealth's citizens. The contents of this Report will reflect favorably on the commitment of the staff to the concept of affirmative litigation.

This Department's accomplishments in the past year extend far beyond the development of these new programs, however. The Department's four Bureaus have had successes in their traditional roles as well. The Civil Bureau, through the efforts of its Eminent Domain, Employment Security, Industrial Accidents, Public Charities and Torts, Claims and Collection Divisions, recovered over $2,014,000 for the Commonwealth during this past year. Attorneys from the Criminal Bureau successfully prosecuted two cases and successfully defended a third case before the United States Supreme Court. Government Bureau attorneys successfully appeared before the United States Supreme Court to defend the constitutionality of the Commonwealth's mandatory retirement statute for state police officers. They preliminarily enjoined a $1.2 billion cutback in the Federal food stamp program and obtained the release of millions of dollars to Massachusetts for the provision of nutrition and prenatal care for women.

The Public Protection Bureau also brought several significant legal actions. Its Consumer Protection Division filed a petition with the Federal Communications Commission to ban drug advertising on television between the hours of 6:00 a.m. and 9:00 p.m. The Civil Rights Division brought or intervened in litigation attacking sex and race discrimination and seeking to uphold individual's right to privacy and a patient's right to die. The Environmental Protection Division, in a case which received national attention, successfully closed Boston's municipal incinerator, which was the largest uncontrolled source of air contaminants in the Commonwealth.

Of course more is involved in representing the Commonwealth than appearing in litigation. The Opinions of the Attorney General issued last year, including important opinions on civil rights, campaign laws, public records and personnel policies, will have a lasting impact. Similarly the regulations drafted by the Consumer Protection Division dealing with nursing homes, automobiles and advertising may prove more significant than any single case we have handled. In those areas, as in all others, this past year was one of progress for the Department. The extent of our accomplishments are chronicled in a limited way in the succeeding pages.

I. CIVIL BUREAU

CONTRACTS DIVISION

The work of the Contracts Division is generally divided into three areas: (A) Litigation, (B) Advice and counsel to state agencies, and (C) Contract review.

A. LITIGATION

The Division represents state officers and agencies at all stages of litigation involving contracts.

Chapter 258 of the General Laws is, for the most part, the controlling statute. Essentially, it is mandatory that all actions against the Common-

wealth be brought in Suffolk County if the amount claimed exceeds $2,000.00. The cases are tried without a jury and, almost universally, are referred to a master for a hearing.

At present, there are 260 active cases in the Division. Eighty-eight were closed out this year.

These cases involve state highway, building or public work construction claims. Most of these cases involve contract or specification interpretation and entail extensive preparation and investigation. Discovery, principally depositions and interrogatories, are mandated on all cases. Consultation with engineers and architects is routine in every instance. Trials are prolonged, not only because of the complexity of issues, but also because most cases involve at least three or four parties.

The general economic picture has generated litigation contesting the award of contracts. This year there have been many more allegations of failure to meet public bidding requirements.

There has also been an increase in suits in which preliminary injunctive relief is sought. The Contracts Division has intensified its opposition to the issuance of preliminary, or temporary, injunctive relief against the Commonwealth, its agencies and officers. The allowance of such relief delays normal contract procedure and results in increased costs.

To date, we have succeeded in defeating all attempts at securing injunctive relief.

B. ADVICE AND COUNSEL TO STATE AGENCIES

Every day, the Division receives requests for assistance from state agencies and officials. Their problems involve formation of contracts, performance of contracts, bidding procedures, bid protests, contract interpretation, and a myriad of other matters. Many of these agencies have no counsel or are subdivisions of Administration and Finance.

All materials, supplies, and equipment purchased by the state (except military and legislative) must be advertised, bid, and awarded by the Purchasing Agent. We receive, each week, new requests for assistance in purchasing matters. Economic conditions have heightened competition. Bid awards are bitterly contested. Members of the Division counsel the Purchasing Agent and his staff, interpret regulations, and attend informal protest hearings.

We also have an equivalent relationship with the Department of Public Works, Metropolitan District Commission, Bureau of Building Construction, Group Insurance Commission, Secretary of Transportation, Regional Community Colleges, Data Processing Bureau, Mental Health, Youth Services, Water Resources, etc.

C. CONTRACT REVIEW

We review all state contracts, leases, and bonds submitted to us by state agencies. During the fiscal year we approved as to form a total of 3, 031 such contracts. In many cases, 325 to be exact, we rejected the documents and approved them when the deficiencies were eliminated.

All contracts are logged in and out and a detailed record is kept. The monthly count for the fiscal year was:

July, 1975	398
August	173
September	379
October	177
November	115
December	236
January, 1976	171
February	219
March	185
April	215
May	219
June	544
	3,031

Contracts are assigned to the attorneys in rotation. The average contract is approved within forty-eight hours of its arrival in the Division.

The work of the Division has been greatly facilitated by the addition to the staff of a professional engineer. His assistance in investigation and in interpretation of contract documents and plans has been of considerable assistance to the trial attorneys.

Four of the attorneys were involved in important appellate matters in which the Commonwealth prevailed. The cases are:

(a) *Maddocks v. Contributory Retirement Appeal Board* 76 A.S. 107 (1/7/76)

(b) *Marlow v. New Bedford & Department of Public Works* 76 A.S. 127 (1/9/76)

(c) *Lotto v. Commonwealth* 76 A.S. 530 (3/1/76)

(d) *Essex County Preservation Association v. Bruce Campbell, Commissioner* No. 75-1392 U.S. Court of Appeals for the First Circuit

The *Maddocks* case is important for its clarification of the Retirement Law, G. L. c. 32, for delineating the functions of an administrative tribunal under G. L. c. 30A, and for defining "substantial evidence" under G. L., c. 30A, section 1(6).

Marlow is important for all construction projects which span the effective date of the Massachusetts Environmental Protection Act.

Lotto is important in the area of procedural due process, defining the circumstance when a private party is entitled to an agency hearing and the extent of such hearing.

Essex was an attempt to enjoin the widening of interstate route I-95.

EMINENT DOMAIN DIVISION

The major function of the Eminent Domain Division is the representation of the Commonwealth in the defense of petitions for the assessment of damages resulting from land takings by eminent domain. The Commonwealth acquires land for among other purposes, rights of way for roads, State

Colleges, recreation and parks, flood control, and easements. The Division deals primarily with the Department of Public Works, the Metropolitan District Commission, the Department of Environmental Affairs, the State Colleges and the University of Massachusetts.

Chapter 79 of the General Laws prescribes the procedure for eminent domain proceedings. Under Chapter 79, when property is taken, the taking agency makes an offer of settlement known as a Pro Tanto, which makes available to the owners an amount the taking agency feels is fair and reasonable, but reserves to the owners the right to proceed through the courts to recover more money. In years past, during the road building boom of the fifties and sixties, land damage matters caused congestion in the civil sessions of the Superior Court. Special land damage sessions were set up to accommodate the trial of these cases and cases were referred to auditors for findings. The auditor system was not entirely satisfactory because too many cases previously tried to auditors were retried to juries. In 1973, the Legislature passed Section 22 of Chapter 79 which provides for the trial of land damage matters before a judge in the Superior Court jury-waived session in the first instance. Either party may reserve their right to jury trial by so filing within ten days of a judge's finding. A trial by jury may be had first only if both parties file waivers of their right to a trial before a judge. The statute also requires the court to make subsidiary findings of fact when the case is heard before a judge.

It has been the practice of our Division to try all our matters in accord with Section 22 before a Justice in a jury waived session. We have found, in most instances, it is not necessary to retry the case, because the findings usually contain a clear statement of subsidiary facts which support the decision. Section 22 appears to be a vast improvement over the auditor system and a means of reducing the number of land damage cases requiring a jury trial.

The Eminent Domain Division, with the assistance of a Rent Administrator on loan or on detail from the Department of Public Works, also collects rent on occupied buildings situated on parcels taken by eminent domain.

The Division consists of a Chief, nine trial attorneys, five secretaries, three investigators, one legal engineer, one rent administrator and one administrative trial clerk. In addition to the trial of land damage matters, the Division has the responsibility of reviewing petitions to register land filed in the Land Court to determine whether the Commonwealth or any of its agencies or departments has, or may have, an interest which may be affected by the petition.

Rental agreements, contracts, deeds and documents relating to land under the control of any of the state's departments or agencies find their way to the Eminent Domain Division to be approved as to form. It is also the function of the Division to make itself available for consultation and the rendering of advice in connection with the Commonwealth's problems relating to land.

Pending Cases-Eminent Domain Division as of June 30, 1976

Eminent Domain Cases	799
Land Court Cases	231
Rent Court Cases	538
Total Cases Pending	1,568

Breakdown of Pending Eminent Domain Cases by County (June 30, 1976)	
Barnstable	19
Berkshire	7
Bristol	56
Essex	145
Franklin	4
Hampden	42
Hampshire	22
Middlesex	145
Norfolk	52
Plymouth	38
Suffolk	137
Worcester	132
	799

Record of Activities, Eminent Domain Division, July 1, 1975 thru June 30, 1976	
Rental Receipts	$154,609.53
Land Court Cases Received	103
Land Court Cases Closed or Withdrawn	56
Land Damage Petitions Received	126
Land Damage Cases Closed by Trial or Settlement	111

EMPLOYMENT SECURITY DIVISION

The Employment Security Division works closely with the Massachusetts Division of Employment Security. It prosecutes employers who are delinquent in paying employment security taxes and employees who file and collect on fraudulent claims for unemployment benefits. The vigorous prosecutions made by this Division have resulted in the recovery of substantial sums of money for the Commonwealth.

During the fiscal year ending June 30, 1976, 1,802 cases were handled by this Division. 1,223 cases were on hand at the start of the year and 579 new cases were received during the year, of which 161 were employer tax cases, 403 were fraudulent claims cases, 4 were appeals to the Supreme Judicial Court, and 11 were court actions brought by or against the Director.

475 cases were closed during the fiscal year, of which 179 were employer tax cases, 286 were fraudulent claims cases, 5 were appeals to the Supreme Judicial Court, and 5 were court actions brought by or against the Director, leaving a balance of 1,327 cases on hand at the end of the fiscal year. Monies collected totaled $609,754.57 from employer tax cases and $213,509.33 from the fraudulent claims cases, making a total recovery of $823,263.90 for the Commonwealth. Increased criminal prosecutions and work study programs have been responsible for substantial sums of money being reclaimed by the Commonwealth.

The Division is charged with the duty of pursuing those individuals found

not complying with the Employment Security Law. During this fiscal year the Division waged an energetic and forceful program in handling all cases referred to the Division for criminal prosecution. At the same time, the Attorney General's office has maintained a policy of giving the erring individual, corporation or business entity every opportunity to make settlement out of court. Concentrated office conferences were conducted with the principals involved to determine whether or not criminal proceedings should be initiated. Criminal prosecutions were taken against those failing to show cooperation with the terms of agreement made by this office, but only after they had received an opportunity to discuss the matter thoroughly. During this fiscal year the Division brought 171 complaints against 129 employers, involving 1,085 counts of tax evasion and totaling $880,252.52 in monies due the Commonwealth. 85 complaints involving 1,317 counts of larceny were brought against 83 individuals found collecting unemployment benefits under fraudulent claims totaling $104,043.00 in monies taken from the Commonwealth. 42 complaints involving 507 counts of larceny by C.E.T.A. claimants were brought against 42 individuals found collecting unemployment benefits under fraudulent claims totaling $42,348.00 in monies taken from the Commonwealth, all together making a total of 125 larceny claims.

Pending in various courts of the Commonwealth, including the United States District Court are the following *16* actions brought against the Director of the Division of Employment Security, namely:

Robert Calef, Plaintiff vs. Eileen Lovett, Review Examiner & John Crosier, Director
Please refer to Gerald Harrison case.

Raymond P. Cox vs. Nancy B. Beecher, et al and John Crosier, D.E.S.
Petitioner contends he should have been appointed manager of the Worcester D.E.S. office. We are awaiting hearing on a motion to dismiss.

Maria De Jesus vs. John D. Crosier, Director
Assigned to Administrative Division.

Velia T. DiCesare, et al vs. John D. Crosier, et al, D.E.S.
Assigned to Administrative Division.

Minnie S. Green PPA, Randolph E. Green vs. Commonwealth of Massachusetts, D.E.S.
Actions contending that the petitioners' unemployment benefits were terminated in violation of the due process clause of the Fourteenth Amendment. The Division's contention is that the interviews given the claimants in the processing of their claims satisfy all due process requirements.

Gerald Harrison, et al v. A. Buchyn, et al, D.E.S. and Richard C. Gilliland, D.E.S.
Petitioner contends that a decision by the Board of Review upholding his disqualification from benefits by an initial decision of the D.E.S., but upon different grounds, violates his Fourteenth Amendment due process rights, specifically notice. The D.E.S. contends that upon an appeal to the Board of Review all issues in the matter are open and the hearing is not limited to the issue upon which the matter was initially decided and of which the petitioner has been notified.

Linguistic Systems, Inc. vs. Richard C. Gilliland, D.E.S. and Harold J. Kearns, D.E.S. and Board of Review, D.E.S. and William F. Nicholson, D.E.S.
This is a petition asking the Court to order the Director to give a copy of the transcript of a hearing held on June 18, 1973. D.E.S. permitted petitioner to make a recording of our record. No further action has been taken in the case which is still pending in court.

Malinda Malone vs. Richard C. Gilliland, D.E.S. and Thalia Felton, D.E.S.
Same issues that are involved in Minnie S. Green case.

Massachusetts Bar Association and Berge C. Tashjian vs. Weaver Associates, Inc. and Francis Perfetto and Richard C. Gilliland, D.E.S., and Mary B. Newman, Exec. Office of Manpower Affairs
A petition contending that only attorneys be allowed to represent parties in proceedings under Ch. 151A. The statute reads "agent or counsel". The Division as yet has not determined its position.

Cambridge & Somerville Legal Services, Inc. vs. Massachusetts Division of Employment Security and John Crosier, D.E.S.
An action requesting that the corporation be allowed to reverse a decision under Sec. 14A of Ch. 151A wherein they elected to pay contributions to the Division. Had they not so elected, they would have saved approximately $2,500. The Division contends that such an election may not be reversed.

Konstantine C. Bazakas vs. The Commonwealth of Massachusetts Division of Employment Security
Matter closed. Complaint withdrawn.

Phyllis K. Prussin vs. Director, D.E.S.
Matter pending, should be concluded without further court action.

D.E.S. vs. Andrew M. Gordon and Ruben L. Stern, Defendants
Appealed

The B. F. Goodrich Company vs. Director, D.E.S.
Petitioner asks for a refund to its employer account of $43,448.42. Petitioner contends it has been double charged.

Hector Rivera, et al vs. John D. Crosier, et al
Assigned to Administrative Division

Stacey Peters & Milton Prye vs. John D. Crosier, Director
Assigned to Administrative Division.

In addition, this Division has appeared on behalf of various representatives of the D.E.S. Director in assault and battery complaints brought by this Division against the claimants involved, and members of this Division have attended formal conferences with the Director of D.E.S., Chief Counsel of the Legal Department of D.E.S., and various assistant Directors and D.E.S. officials, primarily for the purpose of providing informal opinions regarding direction and control of the Division of Employment Security.

It should be noted that due to the increased criminal prosecutions and various work-study programs, substantial sums of money have been reclaimed for the Commonwealth by this Division.

REPORT OF ASSISTANT ATTORNEYS GENERAL
(Employment Security Division)

FOR FISCAL YEAR ENDING JUNE 30, 1976

Cases on Hand July 1, 1975:		1223
Employer tax cases:	542	
Employee overpayment fraud cases:	669	
Supreme Judicial Court Cases- (On appeal from the Board/Review decision):	2	
D.E.S. Director Actions - (Brought in Superior Courts and U.S. District Courts by/or against the Director):	10	
Additional Referrals:		579
Employer tax cases:	161	
Employee overpayment fraud cases:	403	
Supreme Judicial Court Cases - (On appeal from Board/Review decision):	4	
D.E.S. Director Actions - (Brought in Superior Courts and U.S. District Courts by/or against the Director):	11	
Total Cases During Fiscal Year:		*1802*
Cases closed:		475
Employer tax cases:		
1. Paid in full	51	
2. Retransferred - pending final disposition of probation matters	97	
3. Uncollectible	18	
4. Partial payment, balance uncollectible	13	
	179	
Employee overpayment fraud cases: (including C.E.T.A. Fraud)		
1. Paid in full	147	
2. Returned to Claims Investigation Department for Administrative Action	139	
	286	
Supreme Judicial Court Cases - (On appeal from Board/Review decision):		
1. Director's position upheld	2	
2. Petition denied	1	
3. Remanded to District Court and returned to Legal Department for further action	2	
	5	
D.E.S. Director Actions - (Brought in Superior Courts and U.S. District Courts by/or against the Director)		
1. Director's position upheld	2	
2. Action withdrawn	3	
	5	
Cases Remaining on hand June 30, 1976		1327
Employer tax cases:	524	
Employee overpayment fraud cases:	786	

Supreme Judicial Court Cases - (On appeal from Board/Review decision):	1	
D.E.S. Director Actions - (Brought in Superior Courts and U.S. District Courts by/or against the Director)	16	
Total Monies Collected:		$823,263.90
From Employers: $609,754.57		
From Employees: $213,509.33		

Criminal Complaints Brought:

Tax Cases: 171 Complaints, involving *1085* Counts brought against *129* employers re delinquent taxes totaling *$880,252.52.*

Larceny Cases: 127 Complaints, involving *1824* Counts brought against *125* individuals re unemployment benefits fraudulently collected in the amount of *$146,391.00.*

INDUSTRIAL ACCIDENTS DIVISION

The Industrial Accidents Division serves as legal counsel to the Commonwealth in all workmen's compensation cases involving State employees. Pursuant to G.L. c. 152, section 69A, the Attorney General must approve all payments of compensation benefits and disbursements for related medical and hospital expenses in compensable cases. In contested cases this Division represents the Commonwealth before the Industrial Accident Board and in appellate matters before the Superior Court and the Supreme Judicial Court.

There were 9,796 First Reports of Injury filed during the last fiscal year for State employees with the Division of Industrial Accidents, an increase of 155 over the previous fiscal year. Of the lost time disability cases, this Division reviewed and approved 1,642 new claims for compensation, and 117 claims for resumption of compensation. In addition to the foregoing, the Division worked on and disposed of 84 claims by lump sum agreements and 21 by payments without prejudice.

This Division appeared for the Commonwealth on 605 formal assignments before the Industrial Accident Board and before the Courts on appellate matters. In addition to evaluating new cases, this Division continually reviews the accepted cases; that is, those cases which require weekly payments of compensation, to bring them up to date medically and to determine present eligibility for compensation.

Total disbursements by the Commonwealth for State employees' industrial accident claims, including accepted cases, Board and Court decisions and lump sum settlements, for the period July 1, 1975 to June 30, 1976, were as follows:

General Appropriation (Appropriated to the Division of Industrial Accidents)	
Incapacity Compensation	$2,865,165.92
Medical Payments	787,906.56
Total Disbursements	$3,653,072.48

Metropolitan District Commission (Appropriated to M.D.C.)	
Incapacity Compensation	$316,629.40
Medical Payments	117,085.19
Total Disbursements	$433,714.59

This Division also has the responsibility of collecting payments due the "Second Injury Fund" set up by Chapter 152, section 65, and defending the fund against claims for reimbursement made under Chapter 152, section 37 and 37A. During the past fiscal year this Division appeared on 31 occasions to defend this fund against claims for reimbursement by private insurers. As of June 30, 1976, the financial status of this fund was:

Unencumbered Balance	$104,372.51
Invested in Securities	824,754.58
Total	$929,127.09
Payments made to fund	$170,434.10
Payments made out of fund	123,282.14

Pursuant to Section 11A (Acts of 1950, C. 639, as amended), the Chief of this Division represents the Attorney General as a sitting member on the Civil Defense Claims Board. This involved reviewing and acting upon claims for compensation to unpaid civil defense volunteers who were injured while in the course of their volunteer duties. During the past fiscal year the Chief of this Division appeared at both sittings of this Board and acted on 13 claims.

This Division also represents the Industrial Accident Rehabilitation Board. When an insurer refuses to pay for rehabilitative training for an injured employee, this Division presents the case to the Industrial Accident Board on behalf of the Industrial Accident Rehabilitation Board. During the past fiscal year this Division assisted the Industrial Accident Rehabilitation Board in 10 cases, eight of which were adjusted amicably with the insurer involved, and two of which resulted in hearings before the Industrial Accident Board.

During the past fiscal year the attorneys of this Division were called upon numerous times to assist workers in private industry who contacted this Division regarding problems they were having with their compensation claims against private industry and their insurers. Every effort was made to assist these employees in resolving their difficulties or in referring them to persons or agencies wherein the solution to their particular problems lay.

DIVISION OF PUBLIC CHARITIES

FUNCTIONS -

General Laws Ch. 12, §8 charges the Attorney General with the responsibility to

> "enforce the due application of funds given or appropriated to public charities within the Commonwealth, and prevent breaches of trust in the administration thereof."

There are several aspects to the work of the Division of Public Charities: litigation involving the use or administration of charitable monies; supervision of charitable organizations operating within the Commonwealth; and review of wills and accounts with charitable interests. In addition, under G.L. Ch. 194, relating to Public Administrators, the Attorney General represents the State Treasurer in matters involving intestate estates with no heirs.

The staff of the Division consists of four attorneys and six clerical personnel. There is one investigator who is available part-time.

1. *LITIGATION*

The Attorney General is a necessary party to all judicial proceedings involving charities, or monies given to charity (Ch. 12, §8G). Thus, the Division handles a variety of matters. The greatest volume of cases concerned construction of wills, and application of the cy pres doctrine. These cases arise where the language of the will or trust instrument is ambiguous, or the specific charitable beneficiary has ceased to exist. Often, heirs will contest the charitable bequests.

Representative cases include *First Bank and Trust Company of Hampden County v. Attorney General* where the Hampden County Probate Court held that certain bequests to the Unitarian Church of Chicopee failed because of a merger of the church with the Third Congregational Society of Springfield. The Society and the Attorney General appealed the decision, and the Supreme Judicial Court granted direct appellate review. The case will be argued this fall.

In another matter, *Samuels v. Bellotti,* the Suffolk Probate Court upheld the Attorney General's contention that monies held by the Massachusetts Grand Lodge Knights of Pythias as a relief fund constituted a charitable trust, and could not be used for the general purposes of the Lodge.

Two cases which had been pending for several years were settled, favoring the charitable interests. In *White v. Nyman,* Norfolk Probate, the questions were the interpretation of the term "issue" in the will of Grace G. White and construction of the 1969 adopted child statute. In *First National Bank of Boston v. Bellotti,* Norfolk Probate, the testatrix provided that certain trust funds were to be used for an "old ladies' home" after termination of life estates. The heirs of the last life tenant contended that the gift failed, as the project could not be accomplished with the present trust corpus. The Attorney General maintained the position that the cy pres doctrine should be applied, and the monies used for aid to the elderly.

The Division handled many other cases of a similar nature construing the language or intent of the testator or settlor. Representative cases were: *Estate of Thomas M. Shepherd,* (will compromise); *Congregation Ansha Sphard v. Bellotti,* (cy pres petition); *Affiliated Hospital Center v. Attorney General,* (petition to apply trust funds for new medical facility); *Estate of Joseph Lazerquist,* (petition to increase annuity to life tenant).

The Tax Reform Act of 1969, directed at curbing abuses by private foundations, has generated extensive litigation, especially where the creating instrument provided for accumulation of income. Many of these cases, pending for several years, are presently being resolved. In addition, the favorable tax consequences of modifying trusts to create charitable remainder trusts, uni-trust and annuity trusts has resulted in litigation.

Several cases involving large Massachusetts trusts illustrate the problem. *First National Bank of Boston v. The Attorney General* concerns the Jacob Schaellkopf Foundation Trust which mandates the accumulation of income until 2028. Such provisions, if continued, would expose the trust to penalty taxes under IRC §4942. Mass. G.L. Ch. 68A §§1-3 provides for judicial

determination as to whether the provision is mandatory. The beneficiaries, New York Charities, seek to terminate the trust as "illegal or invalid". The indenture provides for termination on those grounds. The trustee has suggested an annual distribution to avoid the tax.

In another situation, the *National Shawmut Bank of Boston v. The Trustees of Boston Public Library,* the trustees of the Deferrari trust for the benefit of the Boston Public Library, have filed a petition which would modify the trust provisions and avoid private foundation status. *Ames v. Town of Easton* presents a similar issue with an accumulation provision.

The Attorney General is also a party to the dissolution of any charitable corporation. With the diminution of charitable funding, especially from governmental sources, many charities have been faced with dissolution or merger. This Division must assure that the charity has complied with all statutory provisions, and is applying any remaining assets to a similar charitable purpose. A problem arises when the charity becomes insolvent and a receiver is appointed to liquidate the assets. Where government funds have been mis-applied, the issues are even more complex, as creditors may receive almost nothing in satisfaction for the debts of the corporation.

During 1976, two charities declared bankruptcy. One, THE ORGANIZATION FOR SOCIAL AND TECHNOLOGICAL INNOVATION, was able to act as its own receiver and distribute a quarter on each dollar to creditors. MASSACHUSETTS RESIDENTIAL PROGRAMS, dependent upon federal funding, petitioned for the appointment of a receiver. This matter will be much more complicated as separate grant funds were commingled, and there are several substantial creditors.

Approximately 230 new litigation matters were handled by the attorneys in Fiscal 1976.

II. *REVIEW OF WILLS AND ACCOUNTS*

Another aspect of the work of the Division is the review of new wills and executor and trustee accounts, and responding to petitions to sell real estate or appoint trustees. Any estate which establishes a charitable interest, even a contingent interest, is subject to the general supervisory powers of the Attorney General.

The purpose of this review process is to assure the proper use of charitable monies. For example, the review of accounts requires a thorough reading of the instrument, past accounts and any court papers. Professional fees, distributions and investments are scrutinized.

FISCAL 1976:

New Wills	809
Trustee Accounts	2508
Executor's Accounts	572
Trustee Appointments	28
Real Estate Matters	70
Miscellaneous	96

III. *CHARITIES REGISTRATION*

Over 12,000 charities are registered with this Division. Obviously, supervi-

sion of these numerous trusts, corporations and unincorporated associations is a large task.

To facilitate this work, and identify the noncharitable organizatons and delinquent charities, we sent a mailing to all charities presently registered by Form 12 (financial reporting form), and a request for copies of charter and by-laws. All charities have been cross-checked for correct addresses, and a new mailing list is being prepared. Each file was reviewed to determine if the organization is, in fact, engaged in charitable activities. Where the actual purposes and activities are not apparent from the materials in our files, the organization was requested to clarify the nature of its activity. The charters of new non-profit corporations were reviewed to determine if they are charitable. When this process is completed, we should have a complete and accurate listing of charities operating within the Commonwealth.

Each charity is required to file annual financial statements (Form 12), an audited financial report or probate account (G.L. Ch. 12, §8F). During May and June 1976, the staff processed approximately 200 pieces of mail daily — opening; date-stamping; posting and reviewing the statements for compliance with the statute. As the filing fee was increased to $15.00, effective March 20, 1976, there was inevitable confusion and insufficient payment, and some forms were returned and reprocessed. Each accompanying check must be processed — "FEE-PAID" stamped; name of charity written on check; list of checks prepared; and checks and copies of list sent to the Chief Clerk's Office.

Pursuant to G.L. Ch. 68, §§16-31, the Attorney General also supervises the solicitation of funds by charitable organizations. Organizations, exclusive of those exempt by Ch. 68, §20, must apply to this Division for a certificate of registration (Form 11). This certificate is issued only where the organization has filed proper financial statements within the prior six months, or is newly established.

FISCAL 1976:

Form 12's	6166
Form 11's	570

FOUNDATION DIRECTORY

Several years ago, the Attorney General's office published the Foundation Directory in response to the public need for a complete listing of grant-making organizations. Due to changes which have affected charitable funding, we have undertaken to revise and augment the listing. A questionnaire was sent to all charities in the March general mailing, which should provide more adequate data for the individuals and organizations seeking grants.

AFFIRMATIVE ACTION

Charitable fraud is not a new phenomenon, but consumer awareness, present economic conditions, and the activities of unscrupulous solicitors and charities, have caused increased concern with this problem.

The Division received numerous requests for information regarding charities in 1976. Consumers inquire as to whether charities are registered, and often ask to see records filed here. Many legal questions are presented to the attorneys by individuals wishing to form charitable organizations, or

requesting advice on the proper administration of charitable funds. The staff of the Division responded to many questions regarding unregistered charities. We succeeded in locating many such groups, and apprised them of the statutory regulations regarding charities.

Street solicitation by unregistered organizations is yet another problem. G.L. Ch. 68, §16 authorized the Attorney General to request the records of any organization or individual soliciting for a charitable purpose on the public ways. The Attorney General has requested the solicitation records of the Unification Church (Holy Spirit Association for the Unification of World Christianity).

IV. *PUBLIC ADMINISTRATION*

A public administrator is an official provided for in G.L. Ch. 194 to administer the property of intestates in certain cases. If a person dies intestate and there is no known husband, widow, or heir of the deceased living in the Commonwealth, a public administrator for the county wherein the person dies leaving property to be administered, may file a petition in the Probate Court for such county, setting forth the facts and requesting appointment. Even though the person dies outside of the county, such administrator may be appointed so long as the intestate left property in that particular county to be administered. In granting such administration, the Court exercises substantially the same jurisdiction and authority as that exercised in the grant of administration in ordinary cases. These laws have no application to testate estates.

The rights and duties of public administrators are purely statutory. Every public administrator must file a bond under Section 2. He must also file an inventory as a condition of the bond, and file his account under Section 11. Yet, as a practical matter, the Probate Court does not require the annual accounting as mandated by Section 11. The only reference to this office is contained in Section 12 — that each Register of Probate notify the Attorney General concerning any breach of duty on the part of a public administrator. The Attorney General also represents the State Treasurer in these matters.

On October 6, 1975, the State Auditors examined the public administration records of the Division of Public Charities. In February of 1976 they submitted their report, stating that there were *737* outstanding public administrator accounts. This number is one which we inherited from previous administrations. In fact, some date back to "1962 or prior". We have succeeded, in seven months, in closing *434* of these accounts — most of which are appointments prior to January 1975.

The accompanying chart (APPENDIX A) gives a year-by-year breakdown of the accomplishments of the Division since receipt of the Auditor's Report. The chart is divided into two component parts: estates from 1975 and 1974, which are not delinquent, and the delinquent estates from the period 1973 through "1962 or prior".

It should be noted that the 1975 figure of *737* outstanding estates has been reduced to *303* in the span of seven months.

Evidently prior administrations did not keep copies of past Auditor's

reports, showing the number of outstanding estates. However, we have obtained these figures. A record of the outstanding estates, as detailed in the State Auditor's Report, is listed below:

Date of Audit	*No. of Outstanding Estates*
1967	715
1970	627
2/11/71	588
3/6/72	586
5/7/73	959
2/11/74	899
10/2/74	837
10/6/75	737

When compared to these past figures, the present figure of 303 demonstrates the amount of activity expended by the Division. Despite these achievements, we are continuing our efforts to lessen this number. A breakdown of our efforts to correct these matters follows:

A. *1975 and 1974*

Original	380
Closed	228
Remaining	152

The administration of these estates presents no problem. Each public administrator has contacted this office and the administration of each is proceeding smoothly. In estates that have not been closed, we have been advised of current action, such as: litigation, petitions to sell real estate, location/proof of heirs, etc. All of the aforementioned are bona-fide reasons, which prevent the public administrator from filing a final account to close the estate. We expect that all of the remaining estates will be closed subject to inevitable delays, i.e., trial dates, etc.

B. *1973 through "1962 OR PRIOR"*

Original	357
Closed	206
Remaining	151

Of the remaining 151, 56 accounts are held by public administrators, who have either been disbarred, deceased, or have refused all reasonable requests to furnish information. The remaining 95 estates do not present significant problems. The administrators, while grossly negligent in winding these up, have kept this office informed of the status of the estates.

FISCAL 1976:

Appointments (New)	207
Litigation	33
Real Estate License	14
Miscellaneous	123

PUBLIC ADMINISTRATION ESCHEATS - FISCAL 1976:

Estates Closed with Escheats	169
Amount of Escheats	$285,351.87

A great deal has been accomplished. The present number of estates — 303 — is a great deal lower than any number contained in previous Auditor's Reports. Also, at the inception of our investigation, the Division records contained absolutely no information of the whereabouts of the hard-core delinquents. The progress as detailed in this report is the product of much concentrated effort.

CONCLUSION:

During fiscal 1976, the staff of the Division made a concerted effort to deal more effectively with the task of supervising charities, in the various aspects discussed in this report. The primary results were achieved in the public administration area, and the registration of charities operating within the Commonwealth.

This was accomplished without affecting the quality of work in the litigation handled by the Division, with the support of the Chief of the Civil Bureau.

APPENDIX A

Year of Appointment of Administrator	No. of Estates		No. Closed As of 8/12/76	
1975	216	380	110	228
1974	164		118	
1973	93		64	
1972	58		38	
1971	31		17	
1970	24		16	
1969	31		21	
1968	33		14	
1967	24	357	10	206
1966	15		6	
1965	13		2	
1964	15		6	
1963	7		0	
1962 or prior	8		7	
Unassigned	5		5	
	737		434	

TORTS DIVISION

The Torts Division operates in three areas — Torts, Collections, and Claims for Compensation for Victims of Violent Crimes.

The Division handles tort cases against the Commonwealth and officers and employees of the Commonwealth. Although the majority of tort actions continue to be motor vehicle cases, we do defend employees charged with false arrest, malicious prosecution, assault and battery, medical malpractice, slander and, negligent maintenance of highways and state facilities.

The number of tort cases opened during fiscal 1975-1976 was 352 and during the same period there were 141 tort actions brought in the various courts of the Commonwealth and the United States District Court. The amount of money payable on releases and executions during the period was $192,479.78.

Payments under Chapter 12, section 3A, the so-called Moral Claims Act, are continuing to be kept at a minimum.

The number of claims received and the amount of the awards made under the Violent Crimes Act, Chapter 258A, continues to increase. During fiscal 1975-1976 there were 403 claims received. There were hearings held on 162 cases and there were twenty-eight cases dismissed. In this same period the Treasurer received notice of 178 awards from the various district courts totalling $767,497.36. These awards are paid by the Treasurer as his appropriations allow.

We are placing considerable emphasis on the investigation of these cases so that unwarranted awards are not made.

The Collections Section which handles care and support claims against patients of state hospitals, claims for tuition at state colleges and universities, as well as damage claims to state property, etc. collected $351,968.48 from these various sources. In addition, unclaimed bank deposits standing in the name of First Judge of Probate in the various counties were recovered under the provisions of Chapter 168, section 31 in the amount of $229,177.79.

A report of the Collections Section for fiscal 1975-1976 follows.

The Torts Division consists of a Chief, five trial attorneys, four investigators, one legal assistant and eight secretaries.

Departments	Amount Collected	No. of Claims Processed
Mental Health	$110,716.44	37
Public Health	101,878.72	245
Public Safety	7,168.12	22
Public Welfare	1,750.00	6
Public Works	50,929.96	213
M.D.C.	12,631.50	45
Education	28,339.97	369
State College	9,839.92	148
Civil Defense Agency	295.00	1
Commission for Blind	500.65	11
Community Affairs	1,090.06	2
Correction Department	2,360.46	4
Industrial Accidents Div.	14,779.07	9
Fisheries & Wildlife	275.50	7
Mass. Rehabilitation	140.43	1
Military Division	1,918.00	2
Natural Resources	115.45	4
Retirement Board	3,923.73	1
Secretary of State	3,315.50	48
Treasury Department (Probate Collections)	229,177.79	—
TOTAL	$581,146.27	1175

NOTE: 608 Number of Completed Claims (Paid and Closed)
1458 Number of Claims disposed of as being uncollectable
513 Number of Claims being Paid on Account
1551 Number of Claims Opened this year

Springfield Office

ANNUAL REPORT - FISCAL YEAR 1976

The Springfield office handles matters of concern to the Attorney General in the four Western counties: Hampden, Hampshire, Franklin and Berkshire. The primary function of the office has been to handle all division references and requests for assistance pretaining to Eminent Domain, Torts, Contracts, Administrative, Environmental, Collections, Public Charities, Victim of Violent Crime cases and election law violations. Only Consumer Protection matters originate in the Springfield office.

The office supplies personnel to the Board of Insurance Cancellation and the License Board of Appeals for monthly sittings which consider approximately 20 cases per sitting.

Listed below are cases which have been worked on in the Springfield office.

EMINENT DOMAIN	*TORT*	*ADMINISTRATIVE*
4 Pending	10 Pending	22 Pending
5 Closed	9 Closed	1 On Appeal
		18 Closed
CONTRACT	*ENVIRONMENTAL*	*COLLECTIONS*
1 Closed	4 Closed	15 Pending
		2 Closed
VICTIM OF VIOLENT CRIME	*CRIMINAL*	*PUBLIC CHARITIES*
18 Pending	3 Pending	1 Closed
7 Closed		

Beginning July 1, 1975 a concerted effort was made to satisfactorily clear a backlog of some 1,300 consumer protection cases. As of April 1, 1976 this task was completed with the following results:

OPENED	*CLOSED*	*PENDING*	*SAVINGS*
1,226	1,743	220	$160,428.34

Period from April 1, 1976 to June 30, 1976:

OPENED	*CLOSED*	*PENDING*	*SAVINGS*
16	194	42	$3,607.12

A full-time Assistant Attorney General assigned to Consumer Protection was added to the staff on February 1, 1976. Since that time, the following cases have been worked on.

LAWSUITS	*CONSENT JUDGMENTS*	*ASSURANCE OF DISCONTINUANCE*	*SAVINGS*
5	2	1	$8,045.00

The two investigators in addition to working on the above cases have also, since January 1, 1976, visited 118 nursing homes to insure compliance with the rules and regulations which became effective February 1, 1976. They also completed 45 investigations pertaining to odometer turnbacks. In addi-

tion, they have worked on numerous cases pertaining to all aspects of the Consumer Protection laws.

On June 3, 1976 a public hearing was held in Springfield regarding the draft of Motor Vehicle Regulations.

The staff also fulfills speaking engagements concerning consumer protection.

The office gives legal assistance to various State agencies upon request.

Our total correspondence on various matters and inquiries other than consumer complaints averages over 150 letters per month.

The staff consists of one Administrative Assistant, two Assistant Attorneys General, two Investigators in Consumer Protection and two Secretaries.

II. CRIMINAL BUREAU

In fiscal 1975-1976, the Criminal Bureau operated in four separate sections: trials, appeals, organized crime, and drug abuse.

The trial section has primary responsibility for the investigation and prosecution of criminal activities within the Commonwealth. Trial section attorneys continued to perform this function and investigated many diverse activities which could not appropriately be left to the local district attorneys. Among the prosecutions was a case involving a misapplication of credit union funds, in which three officials of the credit union were convicted. In another banking case, two more bank officials pleaded guilty to misapplication of funds.

The trial section continued to be active in the field of welfare fraud, investigating and prosecuting many cases. In one notable case, more than $5,000 in restitution was obtained for the Commonwealth. In other litigation, two State health inspectors were convicted of accepting bribes, and another Commonwealth employee was convicted of larceny from the Commonwealth and ordered to make restitution of more than $1,000. The director of a half-way house was convicted in a district court of larceny of the house's funds. His case has been appealed to the Superior Court and should be brought to trial in the fall.

The trial section prosecuted two cases involving the importation into the Commonwealth of untaxed beer. Convictions were obtained and more than 700 cases of beer were forfeited to the Commonwealth. Near the end of the year, an investigation into gaming activities in Plymouth County resulted in the indictment of ten individuals on conspiracy charges. Their cases are still pending. Another investigation is continuing before the Suffolk County grand jury. This involves campaign financing in the city of Boston.

The organized crime section continued to be involved in such diverse areas as gaming, cigarette smuggling, and theft from State agencies. The section cooperates with other agencies in combatting the activities of criminal organizations and provides technical assistance to law enforcement officers and district attorneys. Included in the technical assistance supplied are photographic aid and advice and expert testimony in such novel areas as voice print identification. The section provided assistance to law enforce-

ment agencies both within the Commonwealth and in other states on more than 300 occasions.

The appellate section this year received some relief from its high case load by means of an agreement with the Department of Correction. By that agreement, attorneys from the Department of Correction are defending new civil rights claims made against employees of the Department in the Federal courts. The appellate section has continued, however, to defend such claims brought in the State courts, as well as those brought against non-correction employees of the Commonwealth in any court. It also continued to oppose post-conviction relief petitions, and to deal with sundry other claims of an out-of-the ordinary nature. The criminal post-conviction process has grown to such an extent that appellate section attorneys routinely deal with cases long forgotten by other law enforcement agencies and by the public. This year, for example, the section dealt with claims arising out of the Boston Common parking garage scandal and out of a murder case which was tried in 1968. The parking garage case (which was tried in 1963) may have been laid finally to rest by this year's decision in the Massachusetts Appeals Court. The Court upheld the convictions. The murder case, however, will continue because the decision which the United States Court of Appeals made in the Commonwealth's favor has been challenged in the Supreme Court.

The appellate section had an unusually productive year before the United States Supreme Court. Attorneys for this section presented two cases to the Court and defended a third before that body. In all three cases, Criminal Bureau attorneys were successful and obtained significant rulings in the Commonwealth's favor. The two cases in which the appellate section sought and obtained Supreme Court review arose out of unfavorable decisions in the United States Court of Appeals. Both decisions would have had a significant adverse impact on the administration of justice within the Commonwealth. The first would have required the reversal of many criminal convictions because jurors had not been asked whether or not they were racially prejudiced. The Supreme Court prevented that result by ruling that such questions need be asked only in exceptional circumstances. The second case involved the procedures to be followed prior to the transfer of an inmate of a correctional institution. Again, the appellate section succeeded in obtaining a reversal of the United States Court of Appeals, and a ruling that the Commonwealth's procedures were adequate.

The appeal which Criminal Bureau attorneys defended before the Supreme Court involved a challenge to the Commonwealth's two-tier trial system. For the second time in two years, the Supreme Court was presented with the question of whether the system was constitutional. On this occasion, they reached the merits of the claim and made a definitive ruling that the system was acceptable. With this ruling, the question may be considered closed.

The appellate section also processes demands for the rendition of fugitives from justice. The section examines demands both from law enforcement officials of the Commonwealth and from the governors of other States and renders an opinion as to the legal adequacy of each. In addition, an appellate

section attorney must appear in court whenever a rendition warrant is challenged. More than 100 rendition demands were processed during fiscal 1975-76. The appellate section also administers the Commonwealth's criminal usury laws.

The drug abuse division continued to perform the three primary functions in which it has engaged since its creation: drug education seminars, drug intelligence, and the speaker's program.

The drug education seminar is a two-week program which addresses the problem of drug abuse through the means of education. It is geared primarily for police, but also serves other professionals working in drug-related areas. This program works to educate the people involved who deal directly with drug-related matters, and, on a broader scale, trains these professionals to train others in their respective field.

During fiscal 1976, the drug abuse division held twelve two-week seminars throughout the Commonwealth, from which approximately 450 persons graduated. The seminars were held in conjunction with the Massachusetts State Police Academy in Massachusetts state colleges. All of these colleges agreed to award three college credits for successful completion of the course.

For the operation of these seminars the services of experts in various drug-related fields are obtained. These individuals donate their time to lecture and hold discussion groups. They come from a wide range of agencies and institutions, including the mayor's office, the Treasury Department, the United States Customs Bureau, the Department of Public Safety, the Department of Mental Health, the Drug Enforcement Administration, various courts throughout the Commonwealth, hospitals and detoxification units, and drug rehabilitation programs in half-way houses.

These lectures and discussions cover many areas, such as the psychological and pharmacological aspects of drug abuse, current legislation affecting the area, present State and Federal statutes, informant development, search and seizure, organized crime involvement, local drug problems, achievement in rehabilitation by drug-dependent persons, and different preventative techniques.

During the upcoming year, the drug abuse division is also planning to present four one-week advanced seminars for those who have successfully completed the basic drug education seminar. This will be an intensive drug education course for police officers only.

The drug intelligence unit was in complete operation throughout the fiscal year, with seven police officers assigned to it full-time. Each of the officers covered a designated area of the Commonwealth and made a personal visit to each police office in his area at least once every two weeks. These meetings were held with either the chief of police or an assigned liaison officer.

The purpose of the drug intelligence unit is to gather, analyze, and disseminate information regarding persons dealing in the illegal trafficking of narcotics. The unit uses a complex filing system for this information and notifies all departments and agencies concerning up-to-date information in their areas.

Since the unit's inception, the agents have contacted and cultivated many

informants who have supplied them with valuable information regarding both the illegal traffic of narcotics and other criminal activities. The drug intelligence unit is contacted daily by local, State, and other enforcement agencies requesting information on suspected drug traffic and dealers. It also offers aid ranging from assistance in investigations to legal advice in the preparation of affidavits in support of search warrants.

The drug abuse division has several people who are available for speaking engagements. Many requests for speakers are received from various segments of the community, including civic groups, professional organizations, and school systems. The majority of these requests entail commitments during the evening hours, and it is not unusual for members of the drug abuse division to spend 15 hours a week of their own time to perform these obligations.

III. GOVERNMENT BUREAU

The Government Bureau includes the following divisions:

(1) The Administrative Division, responsible for defending state agencies;
(2) The Affirmative Litigation Division, responsible for initiating affirmative litigation on behalf of state agencies;
(3) The Attorney General Opinions Division, responsible for both the Opinions of the Attorney General and Opinions concerning Conflicts of Interests pursuant to G.L. c. 268A, §10; and
(4) The By-Laws Division, responsible for passing on the legality of all newly enacted municipal by-laws pursuant to G.L. c. 40, §32.

A report on each of the separate divisions follows.

ADMINISTRATIVE DIVISION

The Administrative Division continues to be responsible for defending the Commonwealth and its various agencies in defensive litigation in state and federal court, raising issues of public, administrative, and constitutional law. With the help of newly instituted systems for maintaining statistics on the work of the Division, we are now able to report with greater precision on the new cases which the Division has defended during the fiscal year. The new cases in FY 1976 numbered 601. The quarterly breakdown is as follows:

(1) July-September	1975	(estimated)	175
(2) October-December	1975		151
(3) January-March	1976		133
(4) April-June	1976		142
		TOTAL	601

The litigation of the Administrative Division spans a broad range of government activity. The agencies most frequently represented are the Alcoholic Beverages Control Commission, the Civil Service Commission, the Department of Education, the Commissioner of Corporations and Taxation, the Department of Public Welfare, the Registry of Motor Vehicles and Registry Board of Appeals, the Rate Setting Commission, the Department of Public Utilities, and the Division of Insurance. The Division also received a

number of cases requiring the representation of various state judges, who were named directly as defendants in cases challenging their adjudicatory decisions.

The time spent representing particular agencies cannot be measured exclusively by number of cases. The representation of certain agencies involves a substantial commitment to complex, major litigation. For example, the Division committed extraordinary amounts of time to (1) representation of the Department of Mental Health in litigation seeking to improve the living conditions and level of treatment at the state institutions for the mentally retarded, (2) defense of rate setting decisions by the Department of Public Utilities, which are appealed directly to the Supreme Judicial Court and inevitably raise complex and potentially far-reaching economic and regulatory issues, (3) representation of the Division of Employment Security in suits claiming inordinate delays in both the initial processing of unemployment insurance claims and the scheduling and determinations of appeals from compensation denials, (4) defense of the Department of Public Welfare, whose changes in policies and programs have been subjected to a number of broad class action challenges during the year, and (5) the continuing representation of many state agencies whose hiring practices are subjected to attack on grounds of *de facto* race and sex discrimination.

In this last category of discrimination cases, as in many other areas, the Division's representation may include, as circumstances warrant, not only a vigorous defense but often an effort to work toward a settlement between the parties that serves all the relevant interests. The breadth of this responsibility for representation as well as the variety of strategies employed by Division attorneys in the course of litigation inevitably brings the Division into important areas of economic and social concern, with scores of cases each year raising public questions substantially affecting the state and its citizens.

Examples of such litigation during the year include a defense of the state's mandatory retirement statute for uniformed State Police officers. This case was argued before the United States Supreme Court in December, 1975, and on June 24, 1976, the Supreme Court upheld the statute. Defending the statute against a claim of age discrimination, the Division's lawyers argued successfully that mandatory retirement laws, together with their related pension provisions, are a rational and humane means for preserving efficiency in state employment while at the same time rewarding those who have served the state for many years.

A second case before the United States Supreme Court was *Bellotti v. Baird.* In this case, the Attorney General defended a statute found to be unconstitutional by the U.S. District Court, calling for involvement of parents in the abortion decision of their pregnant daughters. The Attorney General argued that this statute was capable of a narrow construction that would both preserve the primacy of the family unit and protect the privacy interests of pregnant minors. The Supreme Court agreed that a narrowing construction of the statute was possible and ordered that the Massachusetts Supreme Judicial Court be given the opportunity to determine whether this interpretation was the appropriate one. The outcome of this case will have a major impact in the area of family law.

A third case that will be argued before the United States Supreme Court in FY 1977, involves a state statute that restricts fishing in Massachusetts waters to Massachusetts residents. This statute was struck down by the Supreme Judicial Court on the grounds that it violated the Privileges and Immunities clause of the Fourteenth Amendment to the United States Constitution. Because many other states have a similar statute, the outcome of this litigation will have a significant impact on state legislative prerogatives as well as the fishing industry itself.

The Attorney General has appealed to the United States Supreme Court a decision of the U.S. District Court striking down a state statute giving veterans a preference in state employment. The lower court found that this statute operated to exclude women from the more attractive jobs in state service and therefore violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. It is the argument of the Attorney General that, whatever disagreements there may be with the statute on policy grounds, the statute is a rational means of rewarding veterans and, because the legislature had no intention of discriminating against women in passing the veterans preference statute, it satisfies the standards of constitutionality.

The single greatest commitment of Division resources during FY 1976 went toward the negotiation of consent decrees in five cases seeking improvement in the conditions and treatment at state institutions for the mentally retarded. Five lawyers in the Division have had responsibility for these cases. The first consent decree generated by this litigation concerns the Monson State School and was signed just after the end of the fiscal year. It calls for a substantial increase in the personnel providing direct care to patients, and it outlines a process of capital improvement that will significantly enhance the living conditions of patients at Monson. Negotiations looking toward consent decrees at the other institutions, Fernald, Wrentham, Dever, as well as continuing monitoring of the consent decree at Belchertown, signed in 1972, will continue to be a major commitment of the Division in FY 1977.

Another important case involving the mentally retarded raises the issue of special education. The Division is representing the Bureau of Institutional Schools, which is responsible for providing special education to all persons between the ages of three and twenty-one years who reside in state institutions. A class action filed during the fiscal year claims that the current programs are inadequate to the task. The Administrative Division has been attempting to work with the various state officials responsible for treatment and education of the retarded. With the agreement of the Governor we are pursuing a strategy that looks to providing quality programs rather than following a traditional defense posture in the lawsuit.

The Division has continued to carry on the function of representing all 26 Boards of Registration who are responsible for licensing and policing various service professions such as pharmacy, nursing, and medicine. Representation consists primarily of court litigation. However, the Division's lawyers also advise the Boards in the conduct of adjudicatory proceedings for the discipline of members of the profession. Because these Boards of Registra-

tion have no legal staff of their own, this daily process of advice and assistance consumes a significant part of the Division's resources. To enhance these Board proceedings, the Division during the fiscal year developed a set of Rules of Procedure that will, once adopted, provide uniformity and clarity in all proceedings before the Boards. The Division also prepared an extensive manual illustrating the use of the Rules, together with a set of model forms for use by the Boards.

During the year the Government Bureau continued in its efforts to improve internal management and to modernize its operations. Nowhere have these efforts been felt more strongly and with greater effect than in the Administrative Division. Extensive law files and form files have been established to permit lawyers to retrieve papers from past litigation more easily for use in current cases. An enormous backlog of cases, numbering more than a thousand, and often dating back many years, has been resolved. A system that calls on every lawyer to prepare an inventory of all current cases has been instituted; this permits control of our case load of almost two thousand cases, and provides a system for monitoring the progress of all litigation in the Division. Further, a series of training seminars was initiated during the fiscal year. These seminars deal with those phases of litigation most important to Division lawyers, including issues of court procedure and jurisdiction, discovery, and the drafting of pleadings and motions.

An important new facet of the Government Bureau, connected principally to the Administrative Division, is the sponsorship of an Attorney General's Law Clinic in cooperation with Boston College Law School. Under this program, fifteen students receive substantial academic credit for participating in the litigation of the Division, supervised by a member of the Boston College Law faculty and by lawyers within the Division. The program includes a series of seminars in various phases of the lawyering process. During the fiscal year, students worked on literally every part of the Division's work, often appearing in court, and participating in the preparation of cases ranging from state superior court to the United States Supreme Court.

AFFIRMATIVE LITIGATION DIVISION

The Attorney General established the Affirmative Litigation Division in April, 1975, in order to expand the scope of the Government Bureau's activities to include affirmative representation of state agencies on a continuing, programmatic basis. While defensive representation of the Commonwealth and its agencies obviously remains an essential function of the Attorney General, there are many instances when aggressive and thorough representation includes affirmative litigation against other governmental bodies such as the federal government or against private parties. Affirmative litigation permits the Attorney General to take the initiative and focus on matters of widespread and general importance to citizens of the Commonwealth in order to protect the public interest.

Because affirmative litigation represents an opportunity for the Attorney General to set priorities for the use of his limited resources, these cases tend

to be broad in scope. During FY 1976, the Affirmative Litigation Division became involved in twelve such cases. A brief summary follows.

The first lawsuit which the Division brought was a suit in federal court which challenged President Ford's imposition of the oil import license fee. This case attacked increased fuel costs to consumers of over $1 billion and raised important questions concerning the power of the President to impose such fees. Relief was denied by the United States District Court in Washington, D.C., but the Attorney General's argument prevailed before the United States Court of Appeals. Unfortunately, the United States Supreme Court reversed the Court of Appeals and found in favor of the Federal Government.

While the case was ultimately unsuccessful on the legal merits, the litigation focused public attention on the inequities of the oil license fee and, as a result, the fee was voluntarily withdrawn by President Ford shortly after the favorable Court of Appeals decision. Finally, the Oil case was the first of what was to become many joint efforts between Massachusetts and other neighboring states. It created a precedent for many states to join together in litigation to protect their interests. This joint effort has evolved into a continuing federation called the Eastern States' Affirmative Litigation Committee (ESALC).

Another major effort was Massachusetts' involvement in challenging the imposition of the 13 cents first class postage requested by the Postal Rate Service. This complex and multifaceted case has included litigation before the Court of Appeals in Washington, D.C., challenging the immediate imposition of the 13 cent stamp, as well as complicated and lengthy hearings before the Postal Rate Commission. The Postal Rate Commission finally approved the 13 cent stamp rate. Because of the burden which this places both on individual citizens as well as the states themselves, numerous states have joined with Massachusetts to appeal the Commission's decision to the United States Court of Appeals.

The Attorney General also filed affirmative litigation against the federal government challenging illegal governmental activity in the human services area. For example, Massachusetts joined with 26 other states and numerous private individuals and organizations to challenge new food stamp regulations promulgated by the United States Department of Agriculture. These regulations had the effect of eliminating or reducing food stamp benefits to 10.8 million people by a total of $1.2 billion. In Massachusetts alone, approximately 116,000 people would have been affected. In June, 1976, a complaint was filed against the Department of Agriculture, and both a temporary restraining order and a preliminary injunction were obtained, preventing implementation of the restrictive regulations.

Similarly, the Attorney General intervened as a plaintiff in a case in the federal court attacking the failure of the United States Department of Agriculture to spend approximately $685 million under a federal program designed to provide nutrition and prenatal care to women. The court found for the plaintiff and the result forced the release of millions of dollars to Massachusetts which it otherwise would not have received.

Finally, the Government Bureau and the Civil Rights Division worked

together to file suit challenging certain reporting requirements under Title XX of the Social Security Act, which violated individual privacy. Immediately after the complaint was filed, the federal government withdrew the challenged regulations.

In some cases the Attorney General has deemed it in the public interest to support certain activities of the federal government. In the case of *American Medical Association v. Matthews*, the Attorney General intervened on the side of HEW to support the legality of regulations issued by HEW which set maximum cost ceilings on drugs under the Medicaid and Medicare program. These regulations were designed to place reasonable cost limitations on the rapidly expanding medical services programs, while at the same time protecting the welfare of patients.

There are also instances where resort to the courts is the only available means to resolve disputes with neighboring states. Maine and Vermont joined with Massachusetts in filing an original action in the U.S. Supreme Court against New Hampshire. The purpose of the lawsuit was to recover taxes paid to New Hampshire under a New Hampshire statute previously declared unconstitutional. The effort proved unsuccessful and the Court denied the request.

Another important type of affirmative litigation has been in the Massachusetts state courts on behalf of state agencies. The Attorney General has brought suit where informal efforts by the agency to resolve disputes have failed. One such case involved the City of Springfield's failure to place special education students in private schools under c. 766. Also, a number of cases were brought against nursing home operators who fail to comply with statutory requirements and who operate in disregard of the public interest.

A series of 50 suits were brought against corporations who failed to file annual reports as required by statute. Finally, an effort to enforce an order of the Division of Animal Health in order to prevent the spread of equine infectious anemia raised the important question of the State's authority to properly regulate and prevent serious outbreaks of animal diseases.

Occasionally, affirmative litigation can be pursued by intervening in litigation between other parties in order to present arguments that relate specifically to the interests of the Commonwealth. Sometimes, intervention as a defendant rather than as a plaintiff is appropriate. For example, in the case *Zarek v. Attleboro Area Human Services, Inc.*, the Attorney General intervened as a defendant on behalf of the Department of Mental Health to thwart a building inspector's attempt to close down a private, non-profit residential facility for individuals who had been released from a DMH institution. We were successful in arguing that the town's ordinances were precluded by state law, which exempts "educational" facilities from local zoning regulation. This case is now a fundamental part of the DMH effort to emphasize community placements for individuals confined to institutions despite their ability to function as a part of the local community.

The notion that the Attorney General is available and prepared to represent state agencies in affirmative litigation is a novel one. Accordingly, agencies have sometimes been slow to recognize those instances where such litigation might prove effective. We expect that over the next few years the

affirmative litigation brought by the Attorney General will expand as the awareness of its usefulness increases. Further, the Eastern States' Affirmative Litigation Committee (ESALC) will very likely take on a more important role as the eastern states continue to work together to define and protect a mutual interest.

OPINIONS OF THE ATTORNEY GENERAL

The Attorney General issues formal legal opinions to (a) State agencies and officials, (b) the Governor, and (c) either branch of the General Court or legislative committees with respect to pending legislation. Opinion requests range from those affecting a small number of people to issues of statewide importance. In all instances, however, the Attorney General is asked to perform a quasi-judicial function and to exercise his independent legal judgment. This process has been strengthened during the fiscal year by screening out unnecessary or inappropriate opinion requests, by requiring that agency counsel prepare a memorandum of law supporting their requests, and by creating an internal structure within the office of the Attorney General which insures the highest quality product.

Approximately 230 requests were received for Attorney General opinions during FY 1976. Many of these requests came from private citizens, individual legislators, private organizations or municipal governments. Since these entities are not entitled to an opinion of the Attorney General, those requests were declined.

During FY 1976, 77 opinions of the Attorney General were issued. Some were in response to a backlog of opinion requests which had built up over a period of years. A crash effort was undertaken during the past year to reduce these outstanding opinion requests from approximately 120 at the beginning of the fiscal year to 20 which remained open at the close of the fiscal year.

Virtually every opinion of the Attorney General resolved a legal question of some significance and, in many cases, provided guidance to agency officials concerning statutes which have rarely, if at all, been interpreted by the courts.

The fiscal problems of the Commonwealth prompted opinion requests resolving problems of legislative appropriation and the lay-off of state employees. For example, an opinion issued to the Secretary of Administration & Finance found that civil service employees could not be terminated for lack of funds until a budget supporting this basis for termination was passed by the legislature. The budget request itself, without legislative approval, was not sufficient reason for termination. In addition, the Attorney General, after carefully surveying court cases in the area, found that a last hired/first fired policy does not constitute racial or sex discrimination. In another opinion, the Attorney General found that the Governor had the power to refuse to recommend an appropriation for an agency and to veto any such appropriation.

Another important set of Attorney General opinions was concerned with election problems. The Attorney General issued five opinions which clari-

fied the function of the Commission on Campaign and Political Finance, resolved ambiguities under state law with respect to the impending presidential primary, and clarified the Secretary of State's powers regarding certification of signatures for election purposes.

Recent attention to the areas of public records and privacy prompted three Attorney General opinions. The Attorney General found that an individual, under state law, should have access to his criminal record identification information and should be able to receive a copy. However, in interpreting the specific statute governing the Massachusetts Rehabilitation Commission, the Attorney General found that the Commissioner had the power to provide a summary of the record to a person, rather than releasing the entire record.

A number of Attorney General opinions were issued in the area of civil rights. In an opinion issued to the Division of Registration, the Attorney General found that numerous statutes which require citizenship before a person can be licensed were unconstitutional. The Attorney General also found that the statutory requirement that an assistant commissioner of the Division of Labor and Industries be a woman violated state and federal statutes, as well as the Massachusetts and the United States Constitution.

Some requests in the civil rights area questioned the power of the agency officials to take certain steps to eliminate or reduce discrimination. In one such opinion, the Attorney General found that the Governor's Executive Order relating to discrimination applies to the Department of Education's School Board Assistance Bureau and that the Bureau may require contractual assurance of compliance with nondiscrimination laws. Further, the Attorney General found that c. 622 of the Acts of 1971, granted the Department of Education sufficient authority to promulgate regulations concerned with equal opportunity for women in extracurricular athletics. Finally, the Attorney General found that the Urban Lending Program, designed by the Banking Commissioner and various Boston banks to eliminate redlining practices in mortgage lending, did not violate state or federal statutes.

A few requests were received from agencies who desired to purchase land for environmental purposes. The Attorney General opinions dealt with the specific procedures which must be followed for such acquisition and the limitations imposed on the agency. Specifically, the Attorney General found, in an opinion issued to the Metropolitan District Commission, that legislative approval was required before a parcel of land could be acquired in East Boston. Also, the Attorney General advised the Secretary of Environmental Affairs as to the proper procedure with respect to the acquisition of a piece of property in the Walden Pond area and found that such acquisition was proper, if the approval of the Governor was received, as is required by state statute.

The issue of whether publicly supported transportation of nonpublic school students violates the state Anti-Aid Amendment has resulted in a number of Attorney General opinions over the years. The Attorney General attempted to clarify the relevant statute, G.L. c.76, §1, and found that it did not violate either the Massachusetts or the United States Consititution. In a lengthy opinion the Attorney General provided guidance to the Department

of Education in dealing with the specific problems arising under the implementation of this statute.

Finally, two opinions were issued in areas which clarified the role of agencies with respect to their internal decision-making. In an important opinion, the Attorney General made clear that the Division of Hearing Officers, although formally a division of Administration & Finance, could nevertheless hear appeals within Administration & Finance so long as the hearing officers were insulated from bias or prejudice. The opinion clarified the role of the hearing officer and strengthened his independent decision-making status. Also, the Attorney General determined, in response to a request from the Alcoholic Beverages Control Commission, that when one of the Commissioners was unavailable, the "rule of necessity" permitted the two remaining Commissioners to make an agency determination, even when a claim of bias has been raised with respect to one of the two remaining members.

Part of the reason for a large number of opinion requests stems from efforts by many agencies to have a large number of their legal problems resolved by the Attorney General. While such an approach may have once had merit, the Attorney General believes that with the advent of large numbers of agency counsel many of the opinion requests can be resolved by in-house counsel. Where this is not appropriate or where an opinion of the Attorney General is genuinely required to resolve a disputed legal question, agency counsel will be required to provide background research to assist the Attorney General in preparation of his opinion. In this manner, the number of opinions actually rendered can be kept within reasonable bounds thereby permitting the Attorney General to give close attention to important and pressing requests.

The Government Bureau devoted substantial resources to a zone of activity falling between litigation and the formal opinion writing described above. This involves day to day advice to various state agencies and public officials with the objective of resolving legal problems before they reach the stage of a formal controversy requiring either litigation or an Attorney General's opinion. This function grows out of the knowledge gained in litigation and in preparing formal opinions. For example, Bureau attorneys advised the Division of Insurance as to the legality of proposed regulations requiring annual audits of regulated companies by a certified public accountant. Acting on the advice, the Insurance Commissioner issued the regulations in modified form.

An important continuing function of the Bureau is to provide legal advice as the state moves through the process of issuing limited obligation and general obligation bonds. Bureau attorneys determine whether or not the bonds are in conformity with all relevant state statutory and constitutional law. One such question requiring a close reading of state statutes is whether in particular bond issues the full faith and credit of the Commonwealth stands behind the bond, or whether by contrast, the debt obligation may be paid only from limited and special revenues.

The lawyers in the Bureau inevitably spend a substantial amount of time advising the Departments of Public Welfare, Public Health, and Mental

Health. The Welfare Department is responsible for the largest single part of the state budget. The Department of Public Health has wide ranging regulatory power over both public and private providers of health care, and the Department of Mental Health is the single largest state employer and is responsible for maintenance of a number of public hospital facilities.

Conflicts of Interests

Under G.L. c.268A, §10, the Attorney General is directed to issue conflict of interest opinions to state employees and officials when requested. During this fiscal year, 70 formal conflict of interest opinions were issued. These opinions evaluated the factual information surrounding the possible conflict and reached a judgment based upon a reading of the conflict statute, G.L. c.268A, §1 *et seq.* While often the factual circumstances are such that the opinion is useful only as guidance for the individual making the request; the Attorney General has often written the conflict opinions so as to provide general guidance to other similarly situated employees. For example, some opinions dealt with the continuing problem of state employees who may have conflicts of interest on account of their participating in community-based advisory boards. The Attorney General has interpreted c.268A so as to prohibit those activities which represent a genuine conflict of interest, but otherwise to permit these useful volunteer activities to continue.

BY-LAWS DIVISION

The By-Laws Division is responsible for reviewing all newly enacted municipal by-laws to determine whether they conform to statutory and constitutional limitations. During the fiscal year 1976, 1301 by-law submissions were reviewed. In addition, the Division reviewed six home rule charters and amendments, and one historic district designation. Of the 1301 by-laws submitted, 735 were general by-laws, and 566 were zoning by-laws. In each of these two categories approximately 5 percent of the submissions were disapproved for nonconformance with various legal requirements, the primary defect being a failure to follow statutorily mandated procedures in the adoption of the by-law. Another 5 percent of the submissions were disapproved in part. In this situation the objectionable language in the by-law is deleted and the remaining part of the by-law approved. Of the 351 cities and towns in the Commonwealth, the Division received by-law submissions from 272.

Among the significant municipal legislation requiring Division approval were a number of general by-laws which prohibit the drinking of alcoholic beverages in public places within a town. These by-laws are adopted under the general police powers of the town and are aimed at the increasing problem towns have encountered with youthful drinkers who frequently leave schoolyards and parks littered with beer cans and bottles.

Approximately eight towns submitted general by-laws which sought to establish procedures for the recall of elected officials. The public officials toward whom the provisions were directed were the Board of Selectmen and the School Committee. While it is true that there are municipal home rule

charters which provide for similar procedures, the general town by-laws submitted to this office were disapproved. Such by-laws conflict with Article LXXXIX of the Amendments to the Massachusetts Constitution which prohibit municipalities from regulating elections.

During FY 1976 towns continued to submit zoning by-laws which regulate the use of wetlands and floodplains. Such by-laws are apparently designed to meet the qualification guidelines for HUD flood insurance as well as to conserve land which provides a watershed for the town's water supply.

Towns submitted both general and zoning by-laws which either prohibited or sought to regulate self-service gas stations. The zoning by-laws were approved, because they were viewed as a regulation of the type of business to be conducted in the town and were thus within the scope of the Zoning Enabling Act. The general by-laws, however, regulating self-service stations were disapproved on the basis that they were in conflict with extensive regulations adopted by the Board of Fire Prevention pursuant to G.L. c.148, §9. Currently, the Town of Milton is challenging in the Supreme Judicial Court the Division's disapproval of its general by-law regulating self-service stations.

IV. PUBLIC PROTECTION BUREAU

CIVIL RIGHTS DIVISION

I. *INTRODUCTION*

Established by G.L. c. 12, §11A, the Civil Rights Division is one of three divisions contained in the Public Protection Bureau of the Department of the Attorney General. Generally, the Division operates to protect the civil rights and civil liberties of citizens in the Commonwealth. Specifically, the Division initiates affirmative litigation on behalf of citizens, citizen groups, agencies and departments of the Commonwealth in matters involving constitutional protections; and, defends government agencies in cases which raise constitutional issues. In addition, staff of the Division advise the Attorney General of developments and issues in the area of civil rights, draft legislation and investigate complaints of violations of civil rights brought to the attention of the Division by citizens of the Commonwealth.

Finally, through the provisions of G.L. c. 151B, §5, the Division is given the authority to initiate complaints before the Massachusetts Commission Against Discrimination (MCAD) and to represent that agency before trial and appellate courts when judicial review of the MCAD decisions are sought.

At present, the Division is staffed by a Chief, four Assistant Attorneys General, one of whom staffs a Women's Rights Unit, and one of whom heads a Privacy Section, and appropriate support personnel, including a paraprofessional in the Women's Rights Unit. In addition, two Special Assistant Attorneys General are located physically within the Division and are available for specific case assignments in areas consistent with their

expertise. One of these Special Assistant Attorneys General serves as counsel to the Criminal History Systems Board. The other serves as counsel to the Security and Privacy Council.

II. *DESCRIPTION OF ACTIVITIES*

Through Fiscal Year 1976, the activities of the Division were catalogued generally according to nature of the Division's involvement in any one of fourteen separate areas of legal problems involving the protection of civil rights and civil liberties.

A. THE NATURE OF THE INVOLVEMENT

Activity on the part of Division attorneys generally took the form of litigation, non-litigation activity, or affirmative action.

Cases in litigation were those cases in which a Division attorney represented a plaintiff or a defendant in a legal cause of action before a court or an administrative hearing. Many of these matters involved the Department's representation of the Massachusetts Commission Against Discrimination (MCAD), or the representation of an individual before the MCAD.

Among the non-litigation activities were cases disposed of through preliminary negotiations, or activities not of a litigation nature, such as the drafting of legislation or position papers.

Affirmative actions, generally, involved law suits or administrative matters initiated by the Division in response to perceived patterns and practices of discrimination. Such patterns were generally found to exist following self-initiated investigations or were brought to the Division's attention through citizens' complaints.

B. AREAS OF INVOLVEMENT

Generally, matters in which staff of the Division were involved, either through litigation, non-litigation or affirmative action, occurred in the following areas:

Housing
Education
Employment
Sex Discrimination
Privacy
Voting
Public Accommodations
Health
Corrections/Youth Services
Age
Police
Developmentally Disabled
Migrant Workers
Municipal Services

A representative description of cases in each of the several areas of involvement is contained in Section IV below.

III. *STATISTICAL SUMMARY OF CASES*

Active cases in litigation, June 30, 1975

Litigation initiated in Fiscal Year, 1976 (July 1, 1975 - June 30, 1976)	12
Litigation terminated in Fiscal Year, 1976 (July 1, 1975 - June 30, 1976)	36
Active cases in litigation, June 30, 1976	19

IV. *REPRESENTATIVE DESCRIPTION OF LITIGATION*

A. EDUCATION

Morgan v. *Kerrigan.* The Division continues to represent the State Board of Education in the implementation of Phase II and Phase IIB of the United States District Court's decision and order requiring the establishment of a unitary school system in the City of Boston.

Board of Education v. *School Committee of Springfield.* In this case, the Division successfully argued in the Massachusetts Supreme Judicial Court that the City of Springfield had not adequately provided for the educational needs of Spanish-speaking students.

This was the fourth in a series of cases involving the effort of the state board to insure compliance of the Springfield School Committee with the racial imbalance law. In addition, the decision recognized the authority of the State Board to consider constitutional issues in framing administrative orders.

Kelly v. *Anrig.* The Division successfully represented the Defendants before the United States Court of Appeals for the First Circuit in two collateral attacks on the orders in *Morgan* v. *Kerrigan.*

Chaisson v. *School Committee of Orange, Mass.* In this case, the Division represented the state Commissioner of Education who intervened as a Defendant in a challenge to the constitutionality of the state compulsory education law. After the Defendants had filed for summary judgment, the Plaintiffs successfully sought dismissal of the case because they could not afford to pay their attorneys.

Department of Education v. *New Bedford School Committee.* On behalf of the Commissioner of the Department of Education, the Attorney General brought an administrative action against the New Bedford School Committee for failure to implement M.G.L. c. 71A, the Transitional Bilingual Education Act. The suit's objective was to ensure that every student within the New Bedford School system had access to education in his or her dominant language, as required by law. A consent judgment has been obtained. The case is currently in the remedy stage, with the parties attempting to design and implement a bilingual program which will fully comply with state law.

B. CORRECTIONS/YOUTH SERVICES

Inmates of the John Connally Detention Center v. *Dukakis.* Youth incarcerated at the Department of Youth Services Detention Center in Roslindale brought a class action suit alleging that unconstitutional conditions existed at the Detention Center. After numerous hearings, the parties were able to negotiate a consent decree which remedied the alleged abuses and which also provided the Commonwealth with the flexibility necessary to administer the detention center.

The consent decree in *Inmates* v. *Dukakis* has been used as a model in assessing the needs of other detention facilities.

C. EMPLOYMENT

Wheelock College v. *MCAD.* The Massachusetts Commission Against Discrimination found that Wheelock College had discriminated against a woman professor by refusing to renew her contract because of her sex. The Commission awarded the woman back pay for a four year period, during which she had been demoted from a full to a part-time professor, and ordered her reinstatement. The MCAD decision was appealed and was argued before the Supreme Judicial Court in May, 1976. A decision is pending.

NAACP v. *Beecher.* In a suit brought against the Civil Service Commission, the Court found that the examination for firefighters given by the Commission discriminated against minorities. Attorneys from this Division are now participating in the remedy phase of the suit. Difficult and involved negotiations between the plaintiffs and government officials have led to the giving of a new examination. Extensive recruiting of minority applicants was undertaken prior to the examination and has resulted in the largest number of minorities ever to take a firefighter exam in the Commonwealth. At the present time, lists of eligible applicants are being certified to cities and towns, with an increased number of qualified minority applicants available for appointment.

Bellotti, et al. v. *Allyn & Bacon, Addison-Wesley, and Houghton Mifflin.* Three employment cases based on sex and race discrimination were filed with the EEOC after extensive investigation. The issues concern equal pay, promotional opportunities, job segregation and an under-representation of minorities in the work force. Thousands of employees are involved in the class action. Right to sue letters have been received and filing in Federal District Court will occur in the near future.

Garden, et al. v. *Houghton Mifflin.* In this case, the Department of the Attorney General was allowed to intervene and file a complaint alleging sex-based employment discrimination in the publishing industry. The Department's motion was allowed over opposition by defendant, providing precedental value to the proposition that the Attorney General has standing as *parens patriae* on behalf of the citizens of the Commonwealth to enforce their right to equal employment opportunities.

Commonwealth v. *Waltham Police.* Pursuant to its authority under c. 151B, §5, the Division brought a complaint before the Massachusetts Commission Against Discrimination alleging that the Waltham Police Department hiring practices discriminate against minorities. At the conclusion of the fiscal year, the case was in the discovery stage.

Construction Industries of Massachusetts v. *Salvucci.* The complaint in this case challenged special contract specifications designed by the Department of Public Works and included in highway construction contracts for the purpose of assuring adequate employment of minority workers. After a hearing, a decision of the Suffolk County Superior Court upheld the affirmative action specifications of the Department.

D. PRIVACY

Pennsylvania v. *HEW.* Massachusetts, with Pennsylvania and Maryland, brought suit in the Federal District Court for the District of Columbia challenging the validity of regulations of HEW implementing the Title XX programs, designed to provide federal reimbursement for a large number of social service programs including day care, homecare, family planning, and drug and alcohol treatment. The specific regulations challenged were those which required state agencies to maintain detailed files about each recipient. The challenge was based on the argument that the regulations violated statutory and Constitutional rights to privacy.

Soon after the lawsuit was filed, HEW withdrew the challenged regulation. The lawsuit has been continued pending the development of new regulations.

Commonwealth v. *William Filene and Sons.* Protection Services, Inc. a Boston investigative firm, had an arrangement with major department stores in which they were given names of persons caught shoplifting but against whom the stores did not wish to initiate criminal prosecution. The stores, when hiring persons, would then check with PSI to see if a prior incident had occurred. If PSI had a report on an individual, the person would be discharged.

Complainant in this case had been caught allegedly shoplifting some six years earlier. She had thought the incident was resolved and forgotten. Filene's hired her and then terminated her employment within a month without telling her that they were going to check with PSI, or that the PSI report was responsible for her discharge. An attorney from the Division threatened suit pursuant to G.L. c. 93A, the statute providing for consumer protection. In lieu of suit, the attorney accepted an Assurance of Discontinuance, pursuant to §5 of c. 93A, that Filene's would no longer use PSI or any similar agency and would compensate the woman for her troubles.

As the result of Filene's termination with PSI, the latter corporation has been forced out of business.

DiGrazia v. *The Justice of the Municipal Court of the Dorchester District.* The Division is representing the Defendant Justice in this case before the Supreme Judicial Court. His Order for the expungement of a juvenile's arrest record is being challenged in the Supreme Judicial Court. At the close of the fiscal year, the Division was preparing its brief for filing in August and for argument in the Fall of 1976.

Commonwealth v. *Credit Bureau of Nashua, Inc.* The Division threatened suit, pursuant to G.L. c. 93A, against the Credit Bureau of Nashua, Inc. for attempting to coerce its customers into buying back credit reports with the threat of selling those reports to a computerized agency.

At the close of the fiscal year, the Division agreed to accept an Assurance of Discontinuance that the Credit Bureau would cease the practice complained of, would refund all monies collected, and would permit the Attorney General to review all proposed mass mailings into Massachusetts.

E. AGE

Frietchie v. *Dukakis.* This case concerned a challenge to the procedures of the Department of Elder Affairs for implementing a homecare program under Title XX of the Social Security Act. The Division worked with the Department to draft regulations on privacy of personal data and procedures on handling of appeals. At the close of the fiscal year, the case was still pending, but the new regulations had rendered many of the issues moot.

F. HOUSING

MCAD v. *220 Beacon Street.* The Division successfully obtained monetary damages in Superior Court for a black woman who was refused an apartment on account of her race.

G. MIGRANT LABOR

Consolidated Cigar Corporation v. *Department of Public Health.* This case involved a challenge to the validity of the statute and regulations in Massachusetts which require growers to permit access to migrant labor camps. The Division defended the action and counterclaimed for enforcement of the statute, since the plaintiff admitted violation of the statute and regulation with regard to its camps for adolescent workers in the Connecticut River Valley.

The Superior Court of Hampden County granted summary judgment for the defendant. At the end of the fiscal year, the case was on appeal.

H. SEX DISCRIMINATION

Wetzel v. *Liberty Mutual.* In this case, the Division filed an *Amicus* brief in the United States Supreme Court urging the inclusion of pregnancy related disabilities in income protection plans sponsored by defendant insurance companies.

I. DEVELOPMENTALLY DISABLED

Jones v. *Saikewicz.* Defendant in this case was a 67 year old profoundly retarded resident of a state school for the mentally retarded. He was found to have acute terminal leukemia and was given only months to live.

Following the recommendation of a guardian *ad litem,* appointed by the Probate Court, a probate judge ordered that chemotherapy treatment not be administered because the toxic side effects of the treatment would outweigh any benefits. The Judge concluded that such treatment would have serious debilitating consequences for the patient, might prolong his life for a short time but would not cure him of the disease, and would cause severe pain and suffering for the patient.

On petition to the Supreme Judicial Court, the order of the Probate Court was upheld in an unusual case in which the Division filed the *Amicus* brief supporting the guardian and another bureau of the Department was allowed to represent the petitioning superintendent. At the close of the fiscal year, the Court issued a brief *Order* sustaining the Division's position and indicating that a full Opinion would follow. The Court also has asked the Division to recommend procedures for the handling of similar cases in the future.

J. PUBLIC ACCOMMODATIONS

Commonwealth v. *Sopcar, Inc.* The Division brought a complaint before

the Alcoholic Beverages Control Commission against owners of several liquor establishments alleged to have refused to serve black patrons. The ABCC found no probable cause and refused to take action against the owners.

K. OTHER

Liberty Mutual v. *MCAD.* The Massachusetts Commission Against Discrimination subpoenaed employment records from the Liberty Mutual Insurance Company in connection with an investigation of hiring and promotion practices of various large employers within the Commonwealth. Liberty Mutual moved to have the subpoena quashed, arguing that the MCAD was not empowered by statute to serve pre-hearing, investigatory subpoenas. The case was argued before the Supreme Judicial Court and is awaiting decision by that court.

The decision will have great impact on the ability of the Commonwealth to investigate allegations of discriminatory practices.

MCAD v. *Cambridge Housing Authority.* In this case, the Division represented a complainant before the MCAD in an employment discrimination case. The attorney successfully settled the claim for $35,000.00 in back pay, including an award of damages for humiliation, pain and suffering. That award, and the authority of the Commission to order compensation for humiliation, pain and suffering has and will be briefed and argued in the Fall of the Fiscal Year 1977.

V. *REPRESENTATIVE DESCRIPTION OF NON-LITIGATION MATTERS, FISCAL YEAR 1976*

A. CASES RESOLVED THROUGH NEGOTIATION

Hospital Fees

An attorney from the Division threatened suit and subsequently reached agreement with 25 major Massachusetts hospitals regarding the fees they charge patients to obtain copies of their records, a right provided for in G.L. c. 111, §70. After negotiations, all hospitals agreed to lower their fees to 30 cents per page or less, a figure derived from a study done for us by one of the hospitals.

Prisoners' Right To Vote

Attorneys in the Division developed strategies with the State Secretary of the Commonwealth to provide access to voting on the part of prisoners.

Employment Records

The Division developed a model application form to demonstrate to employers how they could comply with Massachusetts law which limits the type of questions prospective employers may ask concerning past criminal history. After a survey of major Massachusetts employers indicated that nearly all violated existing law, the Division threatened to sue 65 employers unless they adopted the model application form or otherwise came into compliance with Massachusetts law. After some negotiation, all employers have settled with the Division.

HUD Foreclosure of Housing Project

Attorneys of the Division entered into negotiations with the Justice

Department to prevent foreclosure by HUD of a housing project in the South End. Intervention became unnecessary as HUD withdrew its action from the Federal District Court.

Lie Detectors

The Division reached agreement with a number of businesses who promised to comply with Massachusetts laws forbidding use of lie detectors by employers.

Petition to HEW Concerning Representative Payees

Together with the State of Connecticut, the Division petitioned the United States Department of HEW to amend its regulations which establish procedures for persons who hold the monies of incompetent persons (representative payees).

The Commission on Civil Rights of the Developmentally Disabled had compiled facts indicating that there were many incidents where representative payees used retarded persons' monies for their own benefit rather than for the retarded person. We urged changes in the regulations to tighten the procedures for appointment of the representative payees and to provide for closer scrutiny of the activities of the payees. As a result of the petition, HEW has extensively revised its procedures.

Credit Discrimination

Through the use of G.L. c. 93A letters, the Division was able to end the use of discriminatory application forms of over fifty finance and loan companies.

Redlining of Service Areas

Through negotiation, the Division was able to reach a settlement with the General Electric Company requiring the Company to provide appliance services in all areas of the City of Boston.

B. LEGISLATION AND LEGISLATIVE ACTIVITIES

In Fiscal Year 1976, attorneys from the Civil Rights Division:

1. Drafted the Fair Information Practices Act, St. 1975, c. 776, for the Legislative Privacy Commission.
2. Drafted later revisions in the Fair Information Practices Act, St. 1976, c. 249.
3. Drafted revisions of the Criminal Offender Records Information Act for the Securities and Privacy Council.
4. Drafted amendments to Child Abuse legislation for the Department of Public Welfare, later enacted into law, St. 1975, c. 528.
5. Drafted legislation to protect the privacy of bank and telephone company records.
6. Assisted in the drafting of legislation establishing no-fault divorces in the Commonwealth.
7. Drafted regulations for the Department of Mental Health establishing standards for human experimentation.
8. Drafted legislation to limit the admissibility of certain evidence in prosecutions for rape.

9. Drafted privacy sections of the legislation reforming the Massachusetts Automobile Insurance law.

C. ATTORNEY GENERAL OPINIONS

In Fiscal Year 1976, attorneys from the Civil Rights Division prepared various opinions on behalf of the Attorney General, including:

1. An opinion concerning the application of Chapter 622, laws of 1972, to athletic programs in public schools.
2. An opinion concerning the layoffs of state employees according to the traditional seniority system and the adverse impact of such layoffs on women and blacks.
3. An opinion as to whether a state statute which mandates employment of a woman is discriminatory.
4. An opinion regarding the propriety of the Department of Youth Services loaning juvenile records to the Harvard Center for Criminal Justice.
5. An opinion as to whether records of the Clerks of Court are Criminal Offender Record Information (CORI).
6. An opinion as to whether non-compliance with election expenditure reporting can be made public.
7. An opinion stating that the anti-discrimination Executive Order applies to school construction projects.
8. An opinion as to whether gun permit applications are public records.
9. An opinion interpreting the statute regarding access to personal records held by the Massachusetts Rehabilitation Commission.
10. An opinion concerning the applicability of antidiscrimination statutes to the Boards of Registration.
11. An opinion concerning access to records held by the Boards of Registration.
12. An opinion regarding modification of birth certificates of post-operative transsexuals.

D. OTHER NON-LITIGATION ACTIVITIES

During Fiscal Year 1976, staff of the Division have also participated in the following non-litigation activities:

1. Sustained a major coordinating and monitoring role, at times involving the entire staff of the Division, in efforts to alleviate racial tensions which arose in the City of Boston following implementation of Judge Garrity's order in the Boston school case.
   The Division's primary contribution was coordinating and working with federal, state and local law enforcement authorities.
2. Participated in extensive negotiations with the administration of the Massachusetts Maritime Academy resulting in the admission of women students to the Academy.
3. Investigated allegations that campus police at Boston State College had engaged in improper surveillance of students and faculty. On the basis of the Division's recommendation, the Attorney General wrote

to the Chairman of the Trustees of State Colleges recommending major administrative changes in the operation of the campus police force at Boston State College.

4. Participated in the inquest of the death of a Puerto Rican youth, shot by a Springfield police officer.
5. Drafted a statement for the Attorney General in opposition to proposed mandatory sentencing laws.
6. Drafted correspondence for the Attorney General informing the Governor that the Privacy Act of 1974 precludes mandatory requirement of revealing one's social security number for the purpose of obtaining a driver's license. The Registry of Motor Vehicles has since amended its policy in this regard.
7. Worked with several task forces on rape to explore funding for the establishment of a central clearing house and resource center for rape victims and for payment of personnel involved with treating rape victims.
8. Participated actively in the ERA coalition, and served by gubernatorial appointment on the Committee to study the effect of the passage of ERA on State statutes.
9. Participated in a task force dealing with problems of women in the criminal justice system.
10. Served on the Security and Privacy Council and represented the Attorney General on the Records Conservation Board and the Criminal History Systems Board.
11. Served as co-chairman of the Privacy Project of the Lawyers Bicentennial Committee sponsored by the Massachusetts Bar Association and Boston 200.
12. Served by gubernatorial appointment on the Advisory Committee for Juvenile Delinquency Prevention.
13. Served on a Department of Mental Health Task Force on experimentation on human subjects.
14. Served as ex-officio member of Governor's Commission on the Status of Women.
15. Wrote articles on privacy for the *Massachusetts Law Quarterly* and the *National Journal of Criminal Defense.*
16. Wrote and co-sponsored the publication of *A Compilation of Massachusetts Law Relating to Privacy and Personal Data.*

THE CONSUMER PROTECTION DIVISION

During the past year, we have concentrated our efforts on developing a systematic approach toward enforcement of the consumer laws of the Commonwealth of Massachusetts. We have brought law suits in every major area of consumer concern and have pleadings which serve as models for litigation in those areas. We have also established a system for monitoring our Consent Judgments on a periodic basis. With respect to litigation, we have identified

major areas of consumer problems and have developed an on-going program in each of them. All of the actions which the Consumer Protection Division took in the past year have dealt with patterns and practices which affect a significant number of consumers. From July 1, 1975 to June 30, 1976, we took legal action in over 125 matters. We obtained 18 Consent Judgments and 26 Assurances of Discontinuance, while many cases remain in litigation. Our joint litigation efforts include a suit filed against The Department of Health, Education and Welfare in conjunction with four other states to force HEW to promulgate disclosure regulations with regard to Professional Standards Review Organizations. We also filed a petition with the Federal Communications Commission with 18 other states to ban drug advertising on television between the hours of 6:00 in the morning and 9:00 in the evening.

The Investigation Section of the Consumer Protection Division operates now in a manner fundamentally different from that of prior years. Investigators of the Consumer Protection Division investigate consumer complaints which indicate a pattern of deceptive trade practice. Much of their action now, however, is affirmative in the sense that investigators no longer wait for complaints to come in; they seek out problems and potential trouble areas in various industries. The past year demonstrated how a systematic approach to investigations has benefited consumers.

Our investigators have been to 1432 auto dealers to check whether they have used car record books. We have conducted 61 extensive raids for odometer spinning. We are also compiling an automobile dealer book which will contain a listing for every dealer in the state.

Of the 873 nursing homes in the state, our investigators have been to 861 homes at least once, and to 584 homes twice, to determine whether (a) our regulations were posted and distributed, (b) a daily rate disclosure had been made in compliance with the regulations.

We have also begun extensive investigations of the hearing aid and funeral industries.

Since Attorney General Bellotti assumed office in January of 1975, the Consumer Protection Division has approached the handling of consumer complaints in a manner that involves reliance on volunteers and local community groups. Representatives of the Division have visited various parts of the state to encourage local groups to form complaint handling organizations. Approximately 25 such agencies exist throughout the state and, together with the Attorney General's Office, now offer consumers in all areas of the state effective complaint handling service. We will continue to handle complaints in these areas of the state where there are no local groups organized for this purpose. As part of our program to assist these local consumer groups, we conduct seminars in consumer affairs monthly. Topics recently discussed include Consumer Legislation, Auto Registration Law, Unfair and Deceptive Advertising, and Landlord-Tenant Problems.

The Consumer Protection Division of the Office of the Attorney General continues to maintain an active Consumer Complaint Handling Section. In the past year, the section has logged in 9,885 consumer complaints and has closed 7,899 complaints. The complaints are handled by at least 50 volun-

teers (including students and others) and the program is administered by four full-time staff members.

The Consumer Complaint Section refers complaints to other consumer agencies when the complaints can be handled more expeditiously by those agencies. In the past year, we have referred over 2,000 cases to local consumer groups, approximately 850 complaints to out-of-state consumer agencies, and more than 1,000 to other Massachusetts State agencies, commissions and departments.

As of June 30, 1976, the staff of the Consumer Protection Division totaled 59 people. This includes 16 attorneys and 16 investigators. Our support staff consists of 27 persons. We also have one attorney and two investigators in the Springfield office working solely on consumer protection matters.

In response to Attorney General Bellotti's desire to focus on broad-based illegal trade patterns and practices, the major efforts of the Consumer Protection Division have been geared toward class action type suits, seeking injunctions against patterns of illegal behavior and restitution for all affected consumers.

ADVERTISING

In the area of advertising, we have continued to systematically review the advertising of record and stereo dealers and have taken legal action where appropriate. We are in the process of drafting advertising regulations under Chapter 93A. We plan to hold hearings on these regulations in October. We are also planning a conference on advertising for the business community with the Massachusetts Merchants Association in the fall. Our major suit in the advertising area is against Volkswagen of America. The litigation is still in the discovery stage. We initiated 23 other suits regarding advertising, and have thus far obtained 10 Assurances of Discontinuance and 2 Consent Judgments.

AUTOMOBILES

The largest number of complaints received in the Consumer Protection Division concern automobiles. In December, 1975, the Attorney General named an Advisory Committee to work with the Division in drafting automobile regulations. We have held public hearings in Boston and Springfield on our proposed regulations, and hope to promulgate the advertising section this summer and the remainder in the fall. We have continued our on-going odometer and used car record book investigations. Also, we have filed additional suits regarding repair and warranty problems while at the same time proceeding with cases already in litigation. In November, 1975, we sent a letter to every automobile dealer in Massachusetts, notifying them that disclaimers of the implied warranty are a violation of the Consumer Protection Act. In the past year we filed 13 suits against automobile dealers. We obtained 2 Assurances of Discontinuance, 2 Consent Judgments, and 2 Final Judgments. The remaining cases are still in litigation.

BANKRUPTCY COURT

For the first time the Attorney General's Office has involved itself in the Bankruptcy Court. We have a strong interest in acting on behalf of consumers in appropriate matters in the Bankruptcy Court and have appeared in a

number of cases. After one year of work we succeeded in having the Bankruptcy Court confirm a plan of arrangement for the Land Auction Bureau. This plan affects 500 consumers who have purchased land through the company. Also, we have proposed a set of amendments to the Bankruptcy Act which we hope to have introduced shortly in the United States Congress. These amendments will insure that state Attorneys General can appear in Bankruptcy Court to aid consumers.

BUSINESS/EMPLOYMENT OPPORTUNITY

This year for the first time we have involved ourselves with a number of business opportunity schemes. In one situation, consumers who purchased franchises lost over $250,000. We are establishing a procedure to monitor all business opportunity ads placed in major newspapers throughout the state. We brought 5 cases in this area in fiscal 1976. We obtained 2 Assurances of Discontinuance and 1 Consent Judgment. The remainder are in litigation.

CAREER SCHOOLS

We have continued our efforts in the area of career schools. Most of the schools with serious problems have closed and refunds have been made to students. We are continuing to work with the Department of Education in this area and are concentrating our efforts now on assuring that all schools are licensed and in compliance with all applicable statutes.

FOOD AND ANTI-TRUST ACTIVITIES

In the area of Food and Anti-Trust violations, our activities have focused primarily on investigating and filing suits against companies with unit pricing, item pricing, and short-measuring violations. We have worked in conjunction with the Division of Standards with respect to short-measure violations. We are also continuing our investigations of anti-trust violations in the food areas of milk, bread, fish, chicken and sugar.

THE HEALTH SPA INDUSTRY

We have continued monitoring the Health Spa industry. The major problem - selling long term memberships that a health spa cannot perform - is still in litigation in the Supreme Judicial Court. We have been successful, however, in avoiding disaster for 8,000 consumers when a health spa went bankrupt by arranging sale of the spas to new companies. We have also begun to act affirmatively by monitoring cases and actng before spas reach insolvency.

HOME IMPROVEMENT AREA

We have brought 10 suits in the home improvement area and obtained one consent judgment. We will continue to systematically monitor home improvement problems.

LANDLORD-TENANT

In the Landlord-Tenant area, we have continued to work with the state Lead Paint Program to enforce the state's lead paint laws. We have obtained 4 Consent Judgments while one other case is still in litigation. We have brought 13 suits with respect to security deposit problems with two resulting in Consent Judgments. In other landlord-tenant areas, we have obtained two Consent Judgments and one Assurance of Discontinuance.

NURSING HOMES

Our nursing home reglations, promulgated under Chapter 93A, went into effect on February 1, 1976. These are the first in the country under a consumer protection statute. In an effort to enforce these regulations, our investigators have visited nursing homes throughout the state in the past year. Of the 873 nursing homes in the state, our investigators have been to 861 homes at least once and to 584 homes twice. During the investigations, we checked to see whether our regulations were posted, distributed, and whether a daily rate disclosure had been made in compliance with our regulations. We have found a 98% compliance rate with regard to both the distribution of summaries and regulations and a 70% compliance rate in regard to rate disclosure. We have compiled a book which contains reports on each nursing home. We will be meeting with and training the investigators from the Department of Public Health, who will in the future, as part of their yearly inspection, check for compliance with the provisions of our regulations regarding posting, distribution, and rate disclosures. We will now attempt to enforce other aspects of our regulations where compliance may be different.

REAL ESTATE

In the area of real estate, our major efforts have been aimed at establishing the warranty of habitability in the sale of residential lots and homes. In one important case, we obtained a preliminary injunction for the first time in Massachusetts requiring a developer to assure the public that his land was fit for residential use. We obtained a Consent Judgment in another such case brought by this office, returning $5,000 to consumers.

MOBILE HOME PARKS

In December of 1975, a letter was sent to all mobile home park owners regarding compliance with various sections of the mobile home statute. In the latter part of 1975, a substantial number of parks whose rules and regulations were not in compliance with the law revised them in order to obtain our approval. One suit has resulted in a Supreme Judicial Court decision upholding the constitutionality of the mobile home statute. *(Commonwealth* v. *Gustafsson,* 1976 Adv. Sh. 1073).

We are also involved in the problems of retaliatory evictions of tenants, and restrictions on the age of the trailers.

TRAVEL

During the past year we have become involved with consumer abuses in the travel industry. The major problems include failure to return deposits for cancelled trips, and misrepresentations as to the nature of the tour. We have filed several suits in this area. We have also worked on possible legislation and explored the possibility of filing a petition before the Civil Aeronautics Board.

TRUTH-IN-LENDING

We have continued to work with the Department of Banking in regard to Truth-in-Lending violations and have brought seven law suits. Of these seven, we obtained 4 Consent Judgments and 2 Assurances of Discontinuance.

HEALTH

It is important that health be viewed as a consumer matter so that the public will be able to make informed judgments in regard to choosing a physician and other medical needs. This office, in conjunction with 4 other states, filed suit against HEW to compel that agency to promulgate disclosure regulations for Professional Standards Review Organizations (PSRO). PSRO's are federally-funded, physician peer-review organizations. They were established to contain the cost and assure the quality of health care services. Release of the information which they collect could be helpful to consumers, and it could be done in such a manner to keep the privacy rights of patients and physicians secure.

In regard to the hearing aid industry, we have conducted thorough investigations and have filed suits to protect consumers.

MISCELLANEOUS ACTIONS

We have filed eleven other suits in various areas. Some of these include the pool industry, the furniture industry, and the television repair industry.

UTILITIES AND RATE REGULATION

This office has an active interest in matters pertaining to utilities and rate regulations. We have intervened in every utility rate case before the Department of Public Utilities. The total amount of money requested by the companies was approximately one billion dollars. The D.P.U. granted the companies only 250 million dollars. We appeared for the first time to represent consumers in the 1976 Automobile Rate case. We have also filed an appeal of the 1976 Auto Rate case which is pending in the Supreme Judicial Court. Finally, we have intervened in proceedings before the Small Loans Regulatory Board in which the maximum rate of small loans will be determined for the first time in 15 years. It is the first time consumers have been represented in this type of matter. The hearings are now concluded and briefs have been filed.

LEGISLATION

We review every consumer bill that comes before the Legislature. An example of one such bill is House 4771, which we supported, establishing rent control for mobile home park tenants in the Peabody area. We suggested that it be enacted statewide. We are also hopeful that our amendments to Chapter 93A to improve the discovery powers of the Attorney General and to clarify penalties will be passed. We are also supporting an executory contract escrow bill to protect consumers who pay for services in advance at health spas, travel agencies, etc.

FUTURE PLANS

We will continue our on-going programs in the traditional areas of consumer complaints. We are developing a computer system to enhance our ability and speed in determining patterns of deceptive trade practices. We will collect consumer complaint information from local consumer groups, other state agencies and our own complaint section. We are confident that this system will be in operation within the next six months. We have also been working jointly with the Criminal Bureau to develop an economic crime program within the Attorney General's Office. We expect that this will be operational by early 1977.

LEGAL ACTIONS

I. *ADVERTISING*

Able Rug Cleaners	Assurance of Discontinuance	Suffolk
Atlantis Sound Inc.	Assurance of Discontinuance	Suffolk
Brigham's Division, Jewel Co., Inc.	Consent Judgment	Middlesex
Discount Records	Assurance of Discontinuance	Suffolk
Harvard Coop	Assurance of Discontinuance	Suffolk
Huston, Nathan	In Litigation	Suffolk
Hyannis Hi-Fi, Inc., d/b/a Nantucket Sound	In Litigation	Barnstable
Jordan Marsh	Assurance of Discontinuance	Suffolk
Kaplan Furniture Co. of New Bedford	Assurance of Discontinuance	Suffolk
Lechmere	Assurance of Discontinuance	Suffolk
Minute Man Radio Co., Inc.	Assurance of Discontinuance	Suffolk
Music Land	Assurance of Discontinuance	Suffolk
Music Smith	Assurance of Discontinuance	Suffolk
New England Audio Co., Inc. d/b/a, Tweeter, Inc.	Assurance of Discontinuance	Suffolk
New England Music City	Assurance of Discontinuance	Suffolk
Old Colony Services & Sales, d/b/a, Olde Colony Stereo	Assurance of Discontinuance	Norfolk
Precision Motors	Assurance of Discontinuance	Suffolk
Record Warehouse	Assurance of Discontinuance	Suffolk
Stereo Component Systems, Inc., d/b/a, Tech Hi-Fi	Assurance of Discontinuance	Suffolk
Strawberries, Inc.	Consent Judgment	Suffolk
Volkswagen of America	In Litigation	Suffolk

II. *AUTOMOBILES*

Abel Ford	In Litigation	Suffolk
Compact Auto Inc.	In Litigation	Worcester
D & J Auto Sales	In Litigation	Suffolk
Duddie's of Worcester, Inc., d/b/a, Duddie Ford, Inc.	Final Judgment	Worcester
David Eck	In Litigation	Norfolk
Joseph Fiori, d/b/a Joe Fiori's Auto Sales	Final Judgment	Essex
Fleischer Auto Sales, Inc., d/b/a, Bob's Auto Sales	Consent Judgment	Barnstable
Hamilton Motor Sales	In Litigation	Suffolk
Harold Kent Ford, Inc.	Consent Judgment	Hampden
Middleboro Auto Sales	Assurance of Discontinuance	Suffolk
Pete's Chrysler - Plymouth	Assurance of Discontinuance	Suffolk
Toyota of Falmouth	In Litigation	Suffolk

III. *BANKRUPTCY*

Land Auction Bureau

Plan of arrangement filed in the Bankruptcy Court: 2,000 consumers notified: $300,000 will be returned to consumers.

IV. *BUSINESS/EMPLOYMENT OPPORTUNITIES*

Automated Industries Int.	Temporary restraining Order Granted - Interlocutory Order Granted	Bristol
Continental Employment Agency	Assurance of Discontinuance	Suffolk
Medical Home Care Services, Inc.	Consent Judgment	Hampden
Mold Specialists Int., Inc.	In Litigation	Norfolk

Overseas Employment Research Bureau	Assurance of Discontinuance	Suffolk

V. *SCHOOLS*

ITT	Settlement	Suffolk
St. Mary's College	Injunction	Suffolk

VI. *FOOD*

Yankee Milk	In Litigation	Supreme Judicial Court

VII. *HEALTH SPAS*

Allen Keene, et al (International Health Spas)	In Litigation	Suffolk
New England Spas, Inc.	In Litigation	Middlesex

VIII. *HOME IMPROVEMENT*

Domingos Batista Trucking & Contracting, Inc.	In Litigation	Bristol
Colby Roofing Company d/b/a Richard Cass	In Litigation	Norfolk
Colony Home Products d/b/a Earl C. Pentland	In Litigation	Barnstable
Ventura S. Correia	In Litigation	Bristol
Anthony Luisi, Robert Luisi, d/b/a Caesaro Construction Co., Luisi Contractors	In Litigation	Suffolk
Thomas O'Connor, d/b/a O'Connor Bros.	In Litigation	Middlesex
Harry Pina, d/b/a Pina Drywall & Repair Service	In Litigation	Bristol
Paul Bunyan Fence	Contempt Petition	Suffolk
San-Mac Industries	Consent Judgment	Essex
United Vinyl, Inc., Seacoast Home Improvement, Inc., Vincent R. Hale, Individually and as an officer and director of United Vinyl, Inc. and of Seacoast Home Improvement, Inc.	In Litigation	Suffolk

IX. *LANDLORD-TENANT*

Lead Paint		
Julian Frattalone	Consent Judgment	Suffolk
Howard Kershaw	In Litigation	Plymouth
Gertrude Spanos	Consent Judgment	Middlesex
Framingham Housing Authority	Consent Judgment	Middlesex
Wish Realty Associates	Consent Judgment	Plymouth
Security Deposits		
Little & Co.	Consent Judgment	Suffolk
Rannan Katz, Ind. & as he is Trustee of Victory Realty	In Litigation	Suffolk
Chatham Development Co.	Consent Judgment	Middlesex
Miscellaneous		
Mass. Rentals, d/b/a Citywide Rentals, City R.E., and Barry Levine	Consent Judgment	Suffolk
Loring Towers	Consent Judgment	Suffolk

Brandywine Village Co. v. Tenants First Coalition	Motion to Intervene	Suffolk
Home-Like Apartments	Assurance of Discontinuance	Suffolk
XI. *REAL ESTATE*		
Murphy (Bird, Inc.)	Temp. Rest. Order	Middlesex
Bull Finch Realty	In Litigation	Suffolk
Skyline Manors, Inc.	Complaint Filed	Hampden
XII. *TRAILER PARKS*		
Garden Mobilehome Park	Discovery	Plymouth
Gustafson, Evert	Supreme Judicial Court came down with a decision regarding the Mass. mobilehome statute.	Plymouth
XIII. *TRAVEL*		
International Leisure Services, d/b/a, Irwin Berman	In Litigation	Suffolk
Quality Travel Corporation of America	In Litigation	Norfolk
XIV. *TRUTH-IN-LENDING VIOLATIONS*		
Dadian Associates, Inc.	In Litigation	Middlesex
Dorchester Weyport Trust	Assurance of Discontinuance	Suffolk
R.J. Ferioli, Inc.	Consent Judgment	Plymouth
Little & Co., Inc.	Consent Judgement	Suffolk
Page Realty, d/b/a, Roger C. Rao, Inc.	Assurance of Discontinuance	Suffolk
Dan Potter, d/b/a, Dan Potter Insurance Agency	Consent Judgment	Norfolk
Realty Sales Co., d/b/a Arthur LaFranchise, Jr.	Consent Judgment	Plymouth
John Federoff, d/b/a The Federoff Agency	Contempt Petition	Suffolk
XV. *HEALTH*		
Hearing Aids		
Accousticon of Worcester d/b/a Richard Ostrander	Defendant assessed a Civil penalty of $5,000 for non-compliance of a Civil Investigative Demand	Worcester
E & S Enterprises, Inc., d/b/a Beltone Hearing Aid Service	Final Judgment	Suffolk
Health Information		
Bellotti, et al v. F. David Matthews, Secretary of HEW (PSRO Complaint)	In Litigation	U.S. District Court of the District of Columbia
XVI. *MISCELLANEOUS*		
Apex Pools	In Litigation	Hampden
Associated Pools	In Litigation	Norfolk
Emerson Rug Co.	Assurance of Discontinuance	Suffolk
International Computer Match of Boston, Inc.	Complaint Filed	Suffolk
International Magazine	In Litigation	Suffolk

Jack's Radio & TV	In Litigation	Essex
Kings Row Fireplace, Inc. Vincent J. Hewitt, Hewitt Associates, Inc.	Consent Judgment	Suffolk
Marquise China Co.	Complaint Filed	Hampden
Paul J. Woods Pools	Master's report	Norfolk
Seamless Flooring	In Litigation	Suffolk
Sheldon Butler, d/b/a, AAA Rental	Complaint Filed	Middlesex
Town & Country Pools	In Litigation	Hampden
Town T.V.	In Litigation	Suffolk
Supreme Furniture, d/b/a Summerfields	In Litigation	Suffolk

XVII. *RATE REGULATION*

Insurance

Bellotti v. Comm. of Insurance	In Litigation	SJC
1976 Auto Insurance Case		
1976 Blue Cross/Blue Shield Case		

Utility rate cases before the Department of Public Utilities

Baystate Gas
Boston Edison (2)
Boston Gas
Brockton Edison
Cambridge Electric
Cape Cod Gas
Commonwealth Gas
Fall River Gas
Fitchburg Electric
Haverhill Gas
Lawrence Gas
Lowell Gas
Massachusetts Electric (2)
New Bedford Gas & Electric
New England Telephone
Western Mass. Electric (2)

Other Actions

New England Telephone - Billing and Termination Regulations
Montaup Power Co. - Motion to Intervene - Federal Power Commission
New England Power Company - Motion to Intervene-Federal Power Commission.

ENVIRONMENTAL PROTECTION DIVISION

I. *INTRODUCTION*

The Environmental Protection Division is established by statute, G.L. c.12, §11D, which also authorizes the Attorney General to take all necessary affirmative action to prevent or remedy damage to the environment.

The Division is presently staffed by a Chief, four Assistant Attorneys General, four secretaries and a Natural Resource Economist. The Secretary of Environmental Affairs and the Departments within her jusidiction generate the bulk of the enforcement cases and defenses handled by the Division. In addition to following the mandate of G.L. c.12, §11D, the Division initiates cases on behalf of the Attorney General in many areas of environmental concern.

Massachusetts has a relatively long-standing and well-established structure of environmental legislation covering, *inter alia,* air and water pollution, coastal and inland wetlands protection, solid waste disposal regulation and outdoor advertising control. The Division is also the legal representative of the Energy Facilities Siting Council, which regulates the siting and construction of electrical generating facilities, oil pipelines and facilities associated with oil refining and production.

The Commonwealth's commitment to environmental protection is reinforced by the Massachusetts Environmental Policy Act and Article 97 of the Amendments to the Massachusetts Constitution, the "Environmental Bill of Rights."

During the past year, the Division has for the first time since its establishment in 1972, been the recipient of federal grant funds. In recognition of the central role performed in Massachusetts by the Attorney General in the enforcement of federal and state air and water pollution standards, the U.S. Environmental Protection Agency granted the Division $86,000 in FY76. These monies have been used primarily for additional staffing, including several new attorneys who will join the office in September.

In addition to conventional legal responsibilities, Attorneys for this Division sit as hearing officers in adjudicatory hearings held pursuant to the procedures of the Department of Environmental Quality Engineering.

II. *DESCRIPTION OF CATEGORIES OF CASES*

A. AIR

Air pollution cases are usually referred from the Department of Environmental Quality Engineering, Division of Air Quality Control, for violations of the state Air Pollution Regulations. The most frequent violations of these Regulations at the present time seem to be municipal incinerators. The statutory authority is M.G.L. c.111, §42.

B. WATER

Water pollution cases are referred from the Division of Water Pollution Control. These cases generally involve a violation of discharge permits issued jointly by the Commonwealth's Division of Water Pollution Control and the United States Environmental Protection Division. Other water pollution cases involve seeking the recovery of costs expended in order to clean up oil spills. The statutory authority is M.G.L. c.21, §§26-53.

C. WETLANDS

Wetland cases are generally referred from the Department of Environmental Quality Management, Wetlands Section; the Department of Environmental Quality Engineering; or by citizen complaints. These cases fall into two categories: (1) cases involving the permit program for altering of wetlands under M.G.L. c.131 §40 and (2) cases challenging the development restrictions which the State is authorized to impose on inland and coastal wetlands pursuant to M.G.L. c.130, §150.

D. SOLID WASTE

Solid waste cases originate from the Department of Environmental Quality Engineering, Division of General Environmental Control. These cases involve the manner in which refuse is disposed and the enforcement of the state's sanitary landfill regulations. The statutory authority is M.G.L. c.111, §150A.

E. BILLBOARD

Billboard cases are referred from the Outdoor Advertising Board. These cases are governed by M.G.L. c.93, §§29-33, which regulate and restrict outdoor advertising and authorize a permit program. A majority are defenses to petitions for judicial review from decisions of the Outdoor Advertising Board.

F. NON-CATEGORICAL

A number of matters are handled by this Division each year which do not fall into the categories above. These are often those initiated or pursued by the Attorney General in areas of broad environmental policy, including, for example, nuclear power plant siting and construction, amicus curiae briefs to the SJC and the Supreme Court, NEPA and MEPA cases, administrative interventions, and energy policy.

III. *DISPOSITION OF CASES*

A. During FY76 (July 1, 1975 through June 30, 1976) this Division opened the following number of cases in each of the listed categories:

AIR		9
WATER		41
WETLANDS		32
SOLID WASTE		21
BILLBOARDS		23
NON-CATEGORICAL		12
Total number of cases opened during FY76	=	138

B. During FY76 (July 1, 1975 through June 30, 1976) this Division closed the following number of cases in each of the listed categories:

AIR		24
WATER		21
WETLANDS		18
SOLID WASTE		8
BILLBOARDS		8
NON-CATEGORICAL		3
Total number of cases closed during FY 76	=	82

C. As of June 30, 1976, the following number of cases remained open in this office in each of the listed categories:

AIR		20
WATER		51
WETLANDS		104
SOLID WASTE		34
BILLBOARDS		47
NON-CATEGORICAL		16
Total number of cases remaining active as of June 30, 1976	=	272

IV. *SOME SIGNIFICANT CASES*

A. AIR

WILLIAM J. BICKNELL/DEPARTMENT OF PUBLIC HEALTH vs. CITY OF BOSTON

This case was referred by the Department of Public Health. The City's municipal incinerator, which was the largest uncontrolled source of air contaminants in the State, was in violation of the State's Air Pollution Control Regulations. After a lengthy and very complicated trial, Judge Hallisey ordered the Boston municipal incincerator closed immediately. After argument, the Supreme Judicial Court denied the City's request to stay the Superior Court's order pending appeal, but granted a maximum three-week stay to allow the City to burn refuse already trucked to the site. This was the first and most significant air pollution control case to be litigated in the Commonwealth. The results and the Court's opinion in the case were published in national journals. The decision held, *inter alia*, that lack of funds is no answer in equity for failure to meet pollution standards.

DEPARTMENT OF ENVIRONMENTAL QUALITY ENGINEERING vs. CITY OF FALL RIVER

This case was referred by the Department of Environmental Quality, Division of Air Quality Control. The City of Fall River was operating its municipal incincerator in violation of State Air Pollution Control Regulations. This Division entered into a Consent Order with the City of Fall River, which provided for the closure of the incinerator by June of 1976. On May 27th the closure date was extended to July 15, 1976.

WILLIAM J. BICKNELL/DEPARTMENT OF PUBLIC HEALTH vs. CITY OF HOLYOKE

This case was referred by the Department of Public Health. The City of Holyoke was operating its municipal incinerator in violation of the State's Air Pollution Control Regulations. This Division sought a Preliminary Injunction which would prohibit the defendant from

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It should be noted that during FY76 this Division recovered $38,314.80 in civil penalties and in the recovery of costs incurred by the Division of Water Pollution Control during oil spill clean up operations.

operating its municipal incinerator. The Motion for Preliminary Injunction was denied and the case was scheduled for trial. After lengthy negotiations, a Consent Order was worked out providing for the closure of the incinerator by July 31, 1976.

B. WATER

DIVISION OF WATER POLLUTION CONTROL vs. WORCESTER SPINNING AND FINISHING COMPANY

This case was referred by the Division of Water Pollution Control, which requested that EPD take action against the Worcester Spinning and Finishing Company for its violation of a final decision rendered after an adjudicatory hearing proceeding. The EPD filed a Consent Judgment in this matter, which provided for an $8,000 civil penalty, a mandatory injunction requiring the construction of pollution control equipment, and fines for the failure to meet the construction schedule.

DIVISION OF WATER POLLUTION CONTROL vs. W. R. GRACE CHEMICAL COMPANY and the CITY OF NORTH ADAMS

This case was referred by the Division of Water Pollution Control. Suit was filed against the W. R. Grace Company for illegally dumping hazardous waste materials into a landfill site and against the City of North Adams for allowing the dumping of these hazardous materials into a landfill site owned and operated by the City. A Consent Judgment was filed in this matter, which provided for a $2,000 civil penalty against the company and a $1,000 civil penalty against the City.

DIVISION OF WATER POLLUTION CONTROL vs. CARLING NATIONAL BREWERIES, INC.

This case was referred by the Division of Water Pollution Control because of Carling Breweries' violation of its NPDES permit, issued jointly by the Division of Water Pollution Control and the United States Environmental Protection Agency. The defendant's plant was discharging industrial wastes into the waters of Lake Cochituate. This Division filed an Order for Judgment, which provided for a $1,000 civil penalty and a cessation of violation.

DIVISION OF WATER POLLUTION CONTROL vs. CITY OF REVERE

This case was referred by the Division of Water Pollution Control. This suit was brought to enforce a joint federal - state discharge permit. The problems which have resulted in sewage being introduced into the storm drainage system after reaching the beach have been known for many years. However, it was not until EPD brought suit that any progress was made toward rectifying them. In April of 1976 a Consent Judgment was filed which provided schedules for initiating and completing the necessary engineering work, an escrow account to be administered by EPD for use in the event that the City did not contract to have the work performed and a liquidated damages clause.

DIVISION OF WATER POLLUTION CONTROL vs. ROCHDALE FUEL COMPANY

This case was referred by the Division of Water Pollution Control. The Division of Water Pollution Control was seeking to recover money it had expended to clean up an oil spill caused by the Rochdale Fuel Company. A tentative agreement was reached and the company will pay the sum of $26,000 to cover the costs incurred by the Division of Water Pollution Control during the oil spill clean up process.

C. WETLANDS

BRUCE MacGIBBON vs. BOARD OF APPEALS OF THE TOWN OF DUXBURY

This Division entered this case as amicus curiae on a motion for reconsideration after the SJC had issued a decision in ruling against the Town of Duxbury which contained language on the "taking" issue damaging to the Commonwealth's and federal government's wetlands control programs. Two modifications to the decision were subsequently issued by the SJC which severely limited the decision's effect and explicitly removed any inference that a constitutional issue had been decided.

D. SOLID WASTE

WILLIAM J. BICKNELL/DEPARTMENT OF PUBLIC HEALTH vs. TOWN OF BRIDGEWATER

This case was referred by the Department of Public Health. The Town of Bridgewater had been in violation of the State's Sanitary Landfill Regulations for years and had become a symbol of municipal resistance to environmental standards. This Division's Motion for Summary Judgment was granted and the Town was ordered to close its dump. This was probably the first Summary Judgment enforcing an administrative order in the Commonwealth, and put teeth into our enforcement posture statewide.

WILLIAM J. BICKNELL/DEPARTMENT OF PUBLIC HEALTH vs. TOWN OF NEWBURY

This case was referred by the Department of Public Health. The Town of Newbury was in violation of the Sanitary Landfill Regulations. On a Motion for Preliminary Injunction the Town was ordered to take affirmative steps to comply with the Regulations, including hiring an engineer submitting plans, and implemention. In order to insure that this is carried out, the Division has set up an escrow account, which will total $23,000. We have received the first installment of $3,000. The funds will be jointly administered by this Division and the Town of Newbury, and will be used to pay for the engineering work required to draw up the plans and for their implementation.

DEPARTMENT OF ENVIRONMENTAL QUALITY ENGINEERING vs. RUBCHINUK

This case was referred by the Department of Environmental Quality Engineering. Mr. Rubchinuk was dumping large volumes of refuse

and was in violation of an administrative order requiring cessation. It had developed into a local "cause celebre." A hearing was held before Judge Adams,who entered an Interlocutory Order restricting much of the dumping and ordering a speedy trial, which was held in November of 1975. A Consent Order was reached whereby the defendant agreed to comply with the final decision of the Department, after a hearing on its administrative order.

In November of 1975 a fire broke out at the site which burned for three months and was visible for miles. Because of the noxious fumes and smoke, an Air Pollution Emergency was declared by Governor Dukakis. When Rubchinuk was unwilling to take the necessary steps to put out the fire, it required a several week combined effort of the National Guard, Department personnel and the local fire department, to put out the fire. Because Mr. Rubchinuk interfered with the fire-fighting efforts, we obtained a restraining order and preliminary injunction against such interference in Suffolk Superior Court.

A final agency decision was issued after a hearing in March, which ordered the defendant to cease all dumping and submit a closing plan in thirty days. A Motion for Stay Pending Appeal was denied by the Superior Court. When the defendant failed once more to submit a closing plan or to allow inspections of his property, we obtained a contempt order for his violation of the Consent Order discussed above. The defendant has again started dumping on his property, so we are now seeking a further contempt order and fines.

E. BILLBOARD

JOHN DONNELLY & SONS vs. OUTDOOR ADVERTISING BOARD - (Brookline)

Donnelly was denied renewal of 22 permits issued by the Outdoor Advertising Board (OAB) for off-premise signs in business and industrial districts of Brookline pursuant to an OAB regulation committing the state agency to enforcement of local by-laws and ordinances. The action of the Board effected a prohibition of off-premise billboards in Brookline. This case proceeded to the SJC which issued a nationally noted landmark decision holding *inter alia* that land use and zoning based on aesthetic considerations alone are within the scope of permissible public purpose. An appeal to the U.S. Supreme Court was withdrawn.

F. NON-CATEGORICAL CASES

HOLYOKE WATER POWER COMPANY/WESTERN MASS ELECTRIC COMPANY - CONNECTICUT RIVER FISHWAYS CASE

This Division represented the fishery agencies of all the States in the Connecticut River Basin (Massachusetts, Connecticut, Vermont, and New Hampshire) in hearings before the Federal Power Commission to require the Western Massachusetts Electric Company to install fish passage facilities at its dam at Turners Falls, Massachusetts. After

evidence was presented, an agreement was reached which will require the company to complete two sets of facilities by 1981 and 1983. This result is a major milestone in the states' program to restore salmon, shad and other anadromous species to the Connecticut River.

TENNECO vs. COMMONWEALTH, et al

The Division is defending the Massachusetts Energy Facilities Siting Council against a federal court suit challenging the state's authority to regulate the siting of gas pipelines on grounds preempted by the federal government. The case involves issues of first impression.

PETITION TO THE CONSUMER PRODUCTS SAFETY COUNCIL

The Attorney General joined a petition of the Natural Resources Defense Council asking for a hearing on whether certain fluorocarbon compounds should be banned as hazardous products.

NON-CATEGORICAL — NUCLEAR POWER PLANTS

SEABROOK, NEW HAMPSHIRE NUCLEAR REACTOR PROCEEDINGS

The Attorney General intervened as an interested state in the NRC licensing proceedings for two nuclear plants in Seabrook, New Hampshire, which is three miles from the Massachusetts border. Along with regional and local environmental groups, and the state of New Hampshire, the Attorney General presented evidence in the hearings on energy policy issues of importance to Massachusetts, such as siting consideraton, evacuation plans, etc. After almost three years, a decision was issued July 1, 1976, granting the permits but containing an unprecedented dissent by the "environmental member" of the licensing board. We have appealed.

BOSTON EDISON/PILGRIM GENERATING STATION UNIT #2

As a party to the pending licensing proceedings for a second reactor at Plymouth, the Attorney General has presented a full affirmative case of ten expert witnesses and has participated in some eleven weeks of evidentiary hearings since October of 1975. During the two and one-half years pendency of this proceeding, the applicant, Boston Edison Company has dropped its original application for a third reactor. In addition, the licensing board in an unprecedented ruling pursuant to our motion, ordered the NRC staff to write its Environmental Impact Statement on the need for power. A decision in this matter is not expected for months.

MONTAGUE POWER PLANT

This proceeding concerns the application of the Northeast Utilities Company to construct nuclear power plants in Montague, Massachusetts. The Commonwealth has moved and argued that the entire proceeding be suspended because of the applicants announcement of a five-year delay in its construction schedule. The utility vigorously maintains its right to convene the proceedings essentially at its own convenience and would like to sit on a license until it decides it should be built. The proceedings have

been *de facto* suspended since the Board has had the Commonwealth's motion before it since May 5, 1976.

V. VETERANS' DIVISION

The Veterans' Division continues to function primarily as an informational agency, referring private citizens to appropriate federal and state officials and agencies so that they may obtain the benefits to which they are entitled. The Division provides day-to-day counsel to the Office of the Commissioner of Veterans' Services and the Veterans' Affairs Division of the Department of the Treasury.

The Division is currently handling litigation in the Supreme Court of the United States concerning the validity of the Massachusetts Veterans' Preference statute. Other significant cases handled include an equal protection challenge to the validity of the system of tuition waivers at state colleges for qualified veterans.

The Following Pages
Contain Opinions Rendered
by the Attorney General
during the Year.

Number 1 July 3, 1975

Honorable John F. Kehoe, Jr.
Commissioner of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts 02215

Dear Commissioner Kehoe:

You have requested my opinion as to whether certain employees of the St. Basil's Seminary for the Eastern Rites and the Salvatorian Center for Ecumenical Studies may be appointed to serve as "special police officers" for certain properties of the Melkite Exarchate (in Methuen and other localities) pursuant to G.L. c. 147, § 10G. Section 10G provides, *inter alia,* as follows:

> "The commissioner may at the request of an officer of a college, university or other educational institution appoint employees of such college, university or other institution as special police officers . . . ."

The essential requirement for appointment under § 10G is that it relates to an educational institution. Such an institution need not be *exclusively* educational to qualify under § 10G; however, a substantial proportion of the institution's activities must be focused upon the formal and vocational education of its members. 1967-1968 Op. Atty. Gen. 75. The Supreme Judicial Court has classified institutions as educational where its stated purpose is "clearly educational" and the work actually done is "dominantly educational . . . and not merely incidental to some other dominant purpose." *Assessors of Boston* v. *Garland School of Home Making,* 296 Mass. 378, 386-87 (1937). See also, 1970-1971 Op. Atty. Gen. 17.

The request which prompted your inquiry is made by the Apostolic Exarcharte for the Melkite whose purpose, according to its corporate by-laws, is to:

> ". . . promote and support public worship; to establish, acquire, take over, manage, direct, conduct, promote and contribute to any religious, benevolent, charitable, educational, or missionary undertaking or undertakings. . . ."

While part of the Exarchate's goals include the furthering of education, it does not appear that education is the *dominant purpose* of the Exarchate; rather, education seems merely to be incidental to the primary purpose of promoting and furthering religious activities. On this basis, then, the Exarchate is not an institution which qualifies under G. L. c. 147, § 10G.

Moreover, the request itself specifically refers to such Exarchate properties as a diocesan chancery, a cathedral, two churches, and a chapel, which are not generally defined as educational institutions. The request for appointments is, therefore, too broad. A more narrow request concerning particular properties would permit appointment under § 10G should you determine, in your discretion, that such request pertained to an educational institution, as defined above, and was presented by an officer of that institution.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 2 July 8, 1975

John R. Buckley
Secretary of Administration and Finance
State House
Boston, Massachusetts 02133

Dear Secretary Buckley:

By letter of May 23, 1975, you have requested an opinion on the following questions:

(1) Whether lack of funds, as demonstrated by the Governor's FY 1976 budget recommendations to the General Court, is sufficient basis for termination of permanent civil service employees in light of M.G.L. Chapter 31, Section 43 (a) or

(2) Whether there would be sufficient basis for termination of permanent civil service employees because of "lack of money" only *after* the Legislature has acted on the Governor's proposed budget in light of M.G.L. Chapter 31, Section 43(a) (emphasis added).

(3) Given Federal law, specifically the 14th Amendment and Federal EEOC requirements, as well as the Governor's Executive Order No. 116, is Section 46G of M.G.L. Chapter 31 constitutional given the fact that there will be a disproportionate percentage of minorities and/or women representing the most recent groups to enter state service who ultimately will be laid off (Footnote omitted).

I shall address these questions in order.

I. Lack of Funds or Money

I shall treat the first and second questions together (as suggested by the use of the conjunction "or" at the end of the first question). They form the following issue:

> May permanent civil service employees be terminated for "lack of money" solely on the basis of the Governor's FY 1976 budget recommendations or, rather, must such terminations await legislative action on the Governor's proposed budget — presumably action by the passage of an appropriation act?

It is my opinion that the Governor's FY 1976 Budget recommendations do not constitute "lack of money" as that phrase is used in G.L. c.31, §43(a). Permanent civil service Employees may not be so terminated, in accordance with this statute, until and unless the Legislature has failed or refused to provide the necessary funds for such positions.*

The second sentence of Mass. G.L. c. 31, §43(a), provides that a permanent civil service employee's office or position may not be terminated "except for just cause and for reasons specifically given him in writing". A lack of work or "lack of money" is cited in the next sentence of that section as one basis for establishing the requisite "just cause".

In responding to your questions, I will assume, without deciding the point,

*This conclusion is reached without reference to any specific budget statute, either enacted or now pending before the Legislature.

that the anticipated terminations would be within the scope of Mass. G.L. c. 31, § 43(a).

The appropriation of funds is an exclusively legislative function, to be exercised only by the General Court. Mass. Const., Part II, c.l, §1, art. 4; Mass. Const. Amendments, art. 63, §3; *Baker* v. *Commonwealth,* 312 Mass. 490, 493, 45 N.E. 2d 470, 472 (1942); *Opinion of the Justices,* 302 Mass. 605, 612-13, 19 N.E. 2d 807, 813 (1939). The Governor has the power and duty to recommend that appropriations be made by the General Court. Mass. Const., Amendments, art. 63, §§2 and 3. The Governor cannot determine the actual level of appropriations, since that is a legislative function. There is no "lack of money" merely because the Governor, in his FY 1976 budget recommendations, may propose reduced levels of expenditure. Whether or not there is a "lack of money" must be determined by reference to the actual levels of appropriation by the General Court.

Therefore, I answer your first and second questions "No" and "Yes" respectively.

II. The Constitutionality of G.L. c.31, §46G

Section 46G of M.G.L. c.31 provides that:

> If the separation from service of persons in the official or labor service results from lack of work or lack of money or from abolition of positions, they shall be separated from service by class and grade, except as hereinafter provided, and be reinstated therein in the same position or in a similar position as that formerly held by them, according to their seniority in the service, so that the senior officers or employees in length of service shall be retained the longest and reinstated first and before any certification of new names. Before any action is taken to effect such a separation from service of any officer or employee, seven days' written notice thereof shall be given to him by the appointing authority.

This Section pertains only to one class of state employees — those classified in civil service. The layoff and recall procedure for classified civil servants is governed by an employee's inverse seniority on the job so that the last employee hired would be the first employee laid off. Section 46G does not apply to tenured non-civil service employees, non-tenured employees appointed on a provisional, probationary or temporary status, or persons employed in positions not subject to G.L. c. 31. Layoffs for non-tenured or non-civil service employees are not covered by the seniority limitations of G.L. c. 31, § 46G. Thus, this section of the opinion concerns itself only with the state employees classified in civil service.

We turn now to those instances where a layoff might affect classified civil service employees. At the outset we make explicit three crucial points. First, we recognize that there has been no finding that the Commonwealth or Civil Service has engaged in past discrimination in hiring. Second, this opinion assumes the absence of such discrimination. Finally, implicit in your question, is the assumption that layoffs of state employees would have an adverse impact on minorities and women since those persons would have dispropor-

tionately low seniority among classified civil service state employees.

The constitutionality of the traditional seniority system, the "last hired-first fired" system as a standard of layoffs and recalls with disproportionate impact on minorities and women, has not been conclusively resolved. Although it may do so in the next year, the Supreme Court has not reached this issue in any decision. The lower federal courts are divided as to whether layoffs consistent with "last hired, first fired" would unlawfully perpetuate the effects of past discrimination and thereby violate Title VII, 42 U.S.C. Sec. 2000e *et seq.* The courts which have sustained challenges to the seniority system have done so upon a finding that there *was* past discrimination which was perpetuated by the seniority system. *Watkins* v. *United Steel Workers,* 369 F. Supp. 220 (E.D. La. 1974), *appeal docketed* no. 74-2604, 5th Cir., June 17, 1974. *Loy* v. *City of Cleveland,* 8 FEP Cases 614, dismissed as moot at 8 FEP Cases 617 (N.D. Ohio 1974). Other federal courts have found that layoffs conducted in reverse order of seniority are racially neutral and do not perpetuate the effects of past discrimination. *Waters* v. *Wisconsin Steelworkers of International Harvester Co.,* 502 F. 2d 1309 (7th Cir. 1974) *petition for cert. filed,* 43 U.S.L.W. 3476 (U.S. Feb. 24, 1975) (No. 74-1064); *Jersey Central Power and Light Co.* v. *Local Unions 327 et al. of the International Brotherhood of Electrical Workers,* 508 F.2d 687, 9 FEP Cases 117 (3rd Cir. 1975).

State courts have not addressed the issue of seniority systems as they perpetuate past discrimination.

The split of authority among the federal courts and the absence of authority in the state courts leave unsettled the precise issue raised by your question.

In these circumstances, certain axioms of constitutional law must be our guide. First, a statute enjoys a presumption of constitutionality. See, *e.g., McCulloch* v. *Maryland,* 17 U.S. (4 Wheaton) 316, 421 (1819); *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 341 (Brandeis, J., concurring); *James* v. *Strange,* 407 U.S. 128, 133 (1972); *Pinnick* v. *Cleary,* 361 Mass. 1 (1971); 42 A.L.R. 3d 194, 208, 218 (cases collected).

Second, a statute must be interpreted to avoid a conclusion of unconstitutionality when the law supports such a conclusion. See, *e.g., Crowell* v. *Benson,* 285 U.S. 22, 62 (1932); *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 348-349 & n.8 (cases collected) (Brandeis, J., concurring); *Commonwealth* v. *Lamb,* 1974 Mass. Adv. Sh. 713, 717-718; *Board of Appeals of Hanover* v. *Housing Appeals Committee in the Department of Community Affairs,* 1973 Mass. Adv. Sh. 491, 512; *Chipman* v. *Massachusetts Bay Transportation Authority,* 1974 Mass. Adv. Sh. 1447, 1453.

Finally, under our explicit assumption of no prior discriminatory hiring of civil service state employees, one assailing the statute on constitutional grounds bears the burden of proving the absence of any conceivable grounds upon which the statute could be supported. See, *e.g., Commonwealth* v. *Henry's Drywall Co., Inc.,* 1974 Mass. Adv. Sh. 2377, 2380; *Colella* v. *State Racing Commn.,* 1971 Mass. Adv. Sh. 1317; *Anton's of Reading, Inc.* v. *Reading,* 346 Mass. 575, 576 (1974); *McQuade* v. *New York Cent. R.R.,* 320

Mass. 35 (1946); *Merit Oil Co.* v. *Director of the Division on the Necessaries of Life,* 319 Mass. 301, 306 (1946).

In light of these principles, I conclude that G.L. c. 31, § 46G, is constitutional and that its operation would not conflict with federal EEOC requirements or Executive Order No. 116. I answer your third question "Yes".

Very truly yours
FRANCIS X. BELLOTTI
Attorney General

Number 3 July 9, 1975

John F. Kehoe, Jr.
Commissioner of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts 02215

Dear Commissioner Kehoe:

You have requested my opinion with respect to the payment of witness fees to officers of the State Police. The propriety of such payments was the subject of opinions issued by previous Attorneys General (see Op. Atty. Gen. Sept. 20, 1960, p. 53; Op. Atty. Gen. Nov. 3, 1967, p. 129), but intervening legislation has caused you to question the continuing validity of these opinions. You now ask the following specific questions:

1. What is the effect of Chapter 1004 of the Acts of 1971 (now G. L. c. 149, § 30C) granting State Police a forty hour work week with overtime compensation on the September 20, 1960 and October 18, 1967 Opinions of the Attorney General interpreting G. L. c. 262, § 53C, which requires the payment of witness fees to State Police officers on duty at night?

2. Under G. L. c. 262, § 53C and G. L. c. 149, § 30C is a State Police officer, whose normal tour of duty on a day or court appearance is a day shift, entitled to a witness fee even though the Commonwealth is compensating him for being on duty and paying him for the time he is spending in court?

The opinion issued by Attorney General McCormack on September 20, 1960 dealt with the question of when a state officer is "on duty at night" within the meaning of G. L. c. 262, § 53B. At the time of the opinion the officers followed a "military routine" whereby they were subject to twenty four hour call, spent their off hours in the state police barracks and received a day of furlough each four days. After examining the pertinent state and federal case law, the Attorney General concluded that spending off hours in the barracks did not constitute being "on duty." Thus, an officer was on duty at night only if any part of the shift he worked occurred during the night time.

Chapter 1004 of the Acts of 1971, now G. L. c. 149, § 30C, eliminated the military routine. State Police officers no longer spend their off hours in the barracks. This change eliminated the occasion for the original request, but

did not affect the underlying validity of the opinion's reasoning. I reaffirm the conclusion of that opinion that a State Police officer is eligible for a witness fee under G. L. c. 262, § 53B only when his tour of duty includes night time hours.

Your request for an opinion also calls into question the current applicability of the 1967 opinion of then Attorney General Richardson. In that opinion the Attorney General stated that officers of the State Police were not covered by G. L. c 262, § 53C. They were, therefore, ineligible to receive either compensatory time off or additional hourly compensation in lieu of witness fees, as provided by that Section. The opinion then went beyond the questions posed and attempted to advise municipalities of the scope of Section 53C.

Chapter 664 of the Acts of 1970 amended Section 53C so as to negate that portion of the 1967 opinion of the Attorney General dealing with the applicability of Section 53C to the State Police. Section 53C now explicitly covers officers of the State Police within the Department of Public Safety. While the legislature altered the applicability of Section 53C, it did not significantly amend the balance of the statute. Thus, that portion of the 1967 opinion which purports to explain the workings of the statute remains valid. Because Section 53C now applies to the State Police, the advisory section of the 1967 opinion pertains to your administration of the statute. I have enclosed a copy of that opinion for your information.

Your second question concerns the payment of witness fees to officers of the State Police who are working day shifts. It is my opinion that such payments are unlawful. General Laws, c. 262, § 50 makes it a criminal offense for any police officer receiving a salary from the Commonwealth or a political subdivision thereof to accept witness fees or additional compensation for appearances as a Commonwealth witness - except as provided in the succeeding sections. Witness fees are authorized by Section 53B to be paid only to State Police officers "on duty at night, or on vacation or furlough, or on a day off." I, therefore, answer your second question in the negative; if an officer is on duty in the day time and must also go to court on that day, he is not entitled to a witness fee.

Respectfully submitted,
FRANCIS X. BELLOTTI
Attorney General

Number 4 July 10, 1975

John E. Harrington, Jr.
Assistant Chief of Fire Training
Massachusetts Firefighting Academy
P. O. Box 948
Framingham, Massachusetts 01701

Dear Mr. Harrington:

Your letter of April 7, 1975 has posed the following question:

Is the signature of an individual student sufficient to release the

Massachusetts Firefighting Academy from liability resulting from accidental injury to the student or must his Department Head sign the release?

A right which has not yet arisen may be released. Such releases have been held valid provided that the student is given sufficient opportunity to read the release prior to signing and the release is clearly worded to avoid any misunderstanding. A release obtained under these circumstances and in the absence of fraud, duress or misrepresentaton or violation of a statutory requirement is a bar to an action by the signer. *Henry* v. *Mansfield Beauty Academy,* 353 Mass. 507 (1968); *Lee* v. *Allied Sports Associates, Inc.,* 349 Mass. 544 (1965).

It is my opinion that an individual student may release the Academy from liability for injury to himself and that the signature of the student is sufficient for that purpose. There is no apparent reason why the Department Head's signature would make a release effective on behalf of the student.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 5 July 10, 1975
Nicholas Roussos, Commissioner
Executive Office of Manpower Affairs
Department of Labor and Industries
100 Cambridge Street
Boston, Massachusetts

Dear Commissioner Roussos:

Pursuant to your request, I have examined a draft of H-2422, legislation proposed to be enacted in order to carry out the Commonwealth's responsibilities under the Occupational Safety and Health Act of 1970, 84 Stat. 1590. The legislation has been proposed in connection with a state plan to be submitted under section 18 (c) (1) of said federal Act. My review of H-2422 has been in accordance with your advice that, pursuant to the requirements of 29 CFR §1902-2 (b), such a plan must be accompanied by a legal opinion of this Department.

Having reviewed the draft bill, it is my opinion that there is no impediment to its enactment under either the Constitution of the Commonwealth or the General Laws.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 6 July 10, 1975

Mr. John R. Buckley, Secretary
Executive Office of
Administration and Finance
State House
Boston, Massachusetts 02133

Dear Secretary Buckley:

You have requested my opinion with respect to the following questions:

1. May the Director of Civil Service, in the exercise of his discretion, determine that there is a special need shown by the City of Somerville, that may be met by hiring disadvantaged (unemployed) residents as police officers which can be satisfied through the use of CETA funds and, if so, may he selectively certify a list of CETA eligible candidates for appointment to the Somerville Police Department who are on the existing certified civil service lists for police officers?
2. If your answer to the preceding question is in the affirmative, in what manner shall the selective certification list be prepared so as to harmonize with current decisions of the Federal and State courts.

Chapter 828 of the Acts of 1974 provides that certain temporary positions, created pursuant to CETA, shall be exempt from the Civil Service provisions of G.L. c. 31. However, Section 2 of Chapter 828 specifically states that this exemption shall not apply to law enforcement officers. Thus, if CETA-eligible candidates are to be certified for the position of police officer, the certifications must conform to G.L. c. 31, and to the regulations promulgated thereunder.

Section 23 of c. 31 provides that the names of persons who pass examinations for appointment to any position classified under the civil service shall be placed upon the eligible lists in the following order.

> (1) Disabled veterans as defined in section twenty-three A, in the order of their respective standing; (2) veterans in the order of their respective standing; (3) persons described in section twenty-three B in the order of their respective standing; (4) other applicants in the order of their respective standing. Upon receipt of a requisition, names shall be certified from such lists according to the method of certification prescribed by the civil service rules. A disabled veteran shall be retained in employment in preference to all other persons, including veterans.

When an appointment is to be made, the Director certifies three names for one vacancy, four names for two vacancies and so forth. (See Civil Service - Rule 14).

All appointments to positions classified under the Civil Service are to be made in the foregoing manner except that, under Civil Service Rule 14, *separate* eligible lists may be kept of those seeking to enter any part of the service in which "special qualifications" are required. In this way candidates having such special qualifications can be certified separately. For example,

Rule 10 would allow creation of a separate eligible list of Spanish-speaking candidates for a position involving public contact in a largely Spanish-speaking area.

There is no indication in your request of any job-related special qualification possessed by CETA-eligibles. Therefore, it is my opinion that the Director of Civil Service may not selectively certify CETA-eligible candidates for appointment to the Somerville Police Department. It is, thus, not necessary to reach the second question you have presented.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 7 July 11, 1975

Mr. Robert Q. Crane
Treasurer & Receiver General
Chairman, State Board of Retirement
73 Tremont Street
Boston, Massachusetts 02108

Dear Treasurer Crane:

You have requested an opinion as to whether an Industrial Instructor qualifies as a "corrections officer" for purposes of G.L.c. 32, §100, which provides in pertinent part that:

> Notwithstanding any provision of this chapter or otherwise . . . if a corrections officer while in the performance of duties and as a result of an assault on his person is killed or sustains injuries which result in his death, there shall be paid to the widow of such . . . corrections officer an annual amount of pension which shall be equal to the amount of salary which would have been paid to such . . . corrections officer had he continued in service in the position held by him at the time of his death.

Your request relates to a claim by the widow of the late Alfred J. Baranowski, Industrial Instructor at MCI Norfolk, for payment of benefits under §100 of c. 32. I find that Mr. Baranowski was such an officer.

Chapter 32 does not contain a definition of the term "corrections officer." Additionally, there is no definition of the term "corrections officer" in the statutes governing the Department of Corrections or the Civil Service Commission.[1] An analysis of the language and history of §100 indicates that its purpose is to give a full pension to widows of those employees of the fire department, police department, and correction agencies who, as a result of their duties, are exposed to the risk of danger on a day-to-day basis. In this regard, it is important to note that the amending legislation to G.L.c.32, §100 has been expansive in nature.[2]

[1]The use of the term *corrections* officer appears to be limited to c. 32, §100. Section 2 of c. 27, the enabling statute of the Department of Corrections, gives the Commissioner the power to appoint "officers." Section 46 of c. 32, which brings prison employees within the Massachusetts retirement and pension system uses the term "officer" and indicates that it shall include "prison officer, correction officer and matron."

[2]For example, the 1969 amendment expanded its coverage of firemen by including those killed while "returning from" in addition to those killed while "responding to an alarm of fire." St. 1971, c. 1012.

Since, as noted above, there is no statutory definition which would indicate whether an industrial instructor qualifies as a corrections officer for purposes of c. 32, § 100, a consideration of the scope of the duties and authority of industrial instructors becomes important. There are both relevant statutory and administrative guidelines.

Section 52 of c. 127 provides that industrial instructors "shall have the same authority relative to prisoners as the subordinate officers of the institution where they are employed." This statutory authority is reinforced by the published and unpublished policies of the Department of Corrections and of the Labor Relations Commissions of the Commonwealth.

The Riot Control plan (1957, as amended in 1961) of the Department of Corrections indicates that in emergency situations industrial instructors are given the same responsibilities - and exposed to the same dangers - as correction officers. Industrial personnel are given "full security, authority and responsibility," regarded as "security personnel," and provided with "training . . . in firearms."

I have been informed that the Department of Corrections does not limit the industrial instructors' assumption of the duties of correction officers to emergency situations. Rather, on a day-to-day basis, industrial instructors carry many of the same security responsibilities and hence, are exposed to similar risks as correction officers. Letter from Robert A. Thomas, Assistant to the Commissioner, Industries to Attorney General's office, June 26, 1975.

The co-mingling of the duties of industrial instructors and correction officers was the basis for the inclusion of industrial instructors in the same bargaining unit as corrections officers by the Labor Relations Commission of the Commonwealth. As indicated by an opinion of a hearing officer of the Labor Relations Commission, members of this bargaining unit are grouped together because they have "frequent and direct contact with the inmate population." As a consequence, "they face a continuing risk of physical harm." Other classes of institutional employees are not included in this bargaining unit because they have "no custodial responsibilities." Hearing Officers Decision, Case Nos. SCR-110, 118, 2063, June 13, 1975.

In conclusion, because of the close similarity between the authority and duty of industrial instructors and correction officers, I find that the late Alfred L. Baranowski, an industrial instructor, was a "corrections officer" within the meaning of G.L.c. 32, §100. Therefore, his widow is entitled to the benefits authorized by that section, provided the State Board of Retirement determines that his death occurred as a result of an "assault on his person" while in the performance of his duties.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 8 July 11, 1975

Ms. Ann S. Ramsay
Assistant Secretary, E.O.A.F.
Personnel Administrative
P.O. Box 2650
Boston, Mass. 02208

Dear Ms. Ramsay:

You have requested my opinion as to whether Director Powers' administrative definition of the word "department" for purposes of layoff, demotion and reinstatement is consistent with the provisions of G.L. c. 31.

By letter dated May 23, 1975, Secretary of Administration and Finance Buckley requested my opinion concerning five questions. Questions three and four related to the issue you have raised — the definition of "department" for purposes of layoff, demotion, and reinstatement. By letter dated May 29, 1975, Secretary Buckley withdrew his request for opinions concerning questions three and four.

Because the Secretary of Administration and Finance has withdrawn his request for an opinion concerning the definition of the word "department", I decline to respond to an indentical question posed by an agency under the jurisdiction of the Secretary of Administration and Finance.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 9 July 18, 1975

Paul A. Chernoff, Chairperson
Commonwealth of Massachusetts
Parole Board
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mr. Chernoff:

The members of the Parole Board have requested my opinion concerning the interpretation of the final sentence of G.L. c. 27, § 4 which provides that:

> Members shall devote full time to their duties, and no member shall hold any other salaried public office or engage in any business or profession for profit during his incumbency.

Your request for an interpretation of this sentence is sought with reference to the types of activities (teaching, consulting, the ministry, and writing for publication) in which Parole Board members have traditionally participated outside of working hours.

The words "business", "profession" and "for profit" are not defined in Chapter 27. Since they are not technical terms and there is no contrary indication in the statute, they are to be construed according to their ordinary

meaning as applied to the subject matter of the act. *Randall's case,* 331 Mass. 383 (1954); *Franki Foundation* v. *State Tax Commission,* 1972 Mass. Adv. Sh. 785.

An analysis of the recent legislative history indicates that this last sentence of c. 27, § 4 was part of an effort to professionalize the Parole Board.[1] The language prohibiting outside activity by Parole Board members, therefore, was part of an overall statutory scheme designed to increase the responsibilities and improve the qualifications of the Parole Board and insure that members devoted full time to their duties. In this regard, it is interesting to note that the prohibitory languge of c. 27, § 4 is more specific than that restricting activities of members of other Boards.[2]

Within this context, "business" and "profession" assume their broadest meaning. Inasmuch as the two terms are used separately, it is presumed that "business" refers to "commercial, manufacturing or service" dealings. *The Random House Dictionary of the English Language,* 201 (1966). The term "profession", although originally limited to the three learned professions of law, medicine and theology, has come to mean any "vocation requiring knowledge of some department of learning or science." *The Random House Dictionary of the English Language,* 1148 (1966). Based on these definitions, I find that the types of activities about which you have inquired (teaching, consulting, the ministry, writing for publication) are within the common and ordinary meaning of "profession."

My next inquiry is directed towards the meaning of the phrase "for profit." Although profit can connote a broad definition of any advantage, benefit or gain, I find that its ordinary dictionary meaning is the receipt of monetary compensation. *The Random House Dictionary of the English Language,* 1149 (1966).

Finally, there is no general requirement that Parole Board members restrict their activities exclusively to Parole Board business. Indeed, the time requirement is that they devote "full time" to their duties. The ordinary meaning of "full time" is the "number of hours in a period . . . considered customary for pursuing an activity." *The Random House Dictionary of the English Language,* 573 (1966).

Using these definitions, I respond to your specific questions as follows:

1. The teaching of a college course during nonbusiness hours for a modest stipend is engaging in a business for profit within the meaning of the statute. The language of the statute does not permit me to draw distinctions between "modest" and "other" stipends.

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[1]In 1970, the Legislature significantly extended the jurisdiction of the Parole Board. St. 1970, c. 298. The language of c. 27, § 4 in question was added by chapter 994 of the Acts of 1971 which increased the qualifications required for appointment to the Parole Board. A significant salary increment for members of the Board, included in earlier drafts of c. 994, was deleted prior to final passage of the legislation.

[2]Prior to the 1971 enactment, the requirement for Parole Board members was that "each shall devote his full time during business hours to the duties of his office." Inserted by St. 1963, c. 801. Section 15 of c. 27 governing the Industrial Accident Board, provides that "the members . . . shall devote their whole time to the work of the Board and shall not engage in any profession, practice or business." Section 9P of c. 23, which governs the Labor Relations Commission of the Department of Labor, provides that "members shall devote their whole time to the work of commission and shall not engage in any profession, practice or business."

2. The occasional providing of consultant or professional evaluation services is similarly prohibited by the statute.
3. If the monies received from teaching and/or consulting were donated to a charitable or nonprofit organization, the activities would not be "for profit" and, therefore, not prohibited by c. 27, § 4.
4. A member who is also a member of the clergy may receive money in the form of a housing allowance from a parish. A rental allowance furnished to a minister, to the extent it is used as rent or to provide a home, is *not* included in gross income. INTERNAL REVENUE CODE of 1954, § 107. I, therefore, find that the member of the clergy is not engaging in a profession "for profit" by accepting a housing allowance.
5. A member who is also a member of the clergy may not receive nonsubsistence income from his parish as compensation for clerical work.
6. Members may not receive financial return for published writing, if the financial return is in an amount greater than that necessary to compensate for their out-of-pocket expenses.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 10 July 22, 1975
Charles J. Dinezio
Executive Director
State Building Code Commission
141 Milk Street
Boston, Massachusetts 02109

Dear Mr. Dinezio:

You have requested my opinion relative to an apparent conflict between the State Building Code, which was promulgated pursuant to Chapter 802 of the Acts of 1972, and the provisions of the so-called "Tenement Housing Acts," G.L. c.144 and c.145. Chapter 144 deals with tenement houses in cities other than Boston and Chapter 145 applies to tenement houses in towns. Both statutes require local acceptance before becoming effective.

Your request does not enumerate specific instances in which the building code and tenement housing acts conflict. Instead you have stated that "there are few matters covered by Chapters 144 and 145 which are not in conflict with the State Building Code." You have asked me to give my opinion as to whether "in all cases of conflict . . . the State Building code takes precedence over the Tenement Housing Acts in cities or towns which have adopted them."

The Code was not intended to repeal or pre-empt Chapters 144 and 145. Therefore, I am of the opinion that no conflict exists between the Code and

the statutes cited and that both are fully operative. I reach this conclusion by applying three standard rules of statutory construction.

The first rule is that when two statutes are alleged to be inconsistent with each other, whether in whole or in part, they are to be construed harmoniously if possible. See *Goldsmith* v. *Reliance Insurance Company,* 353 Mass. 99 (1969). Only where the two statutes cannot be reconciled, will one statute give way to the other. I am of the opinion that the acts in question can both be given effect. The purpose of the tenement housing acts was not to create a comprehensive code but was instead to establish minimum standards for tenement houses. Section 4 of Chapter 144 provides (in language substantially similar to that contained in Section 5 of Chapter 145):

> This chapter shall be held to provide the minimum requirements adopted for the health and safety of the community. Nothing in this chapter shall be construed as prohibiting any city from enacting from time to time supplementary ordinances imposing further restrictions, but no city authority shall have power to minimize, avoid or repeal any provision of this chapter.

While the tenement housing act merely establishes minimums, and even then only for multiple unit residential real estate, the State Building code provides a comprehensive set of construction rules. Because I am constrained to interpret the statutes harmoniously, I conclude that, to the extent practicable, tenement houses must conform to both the general requirements of the Code and the specific requirements of Chapters 144 and 145. Where the requirements differ, the stricter of the two must be met.

The second rule I have applied is that the implied repeal of one statute by another is not to be lightly inferred. To hold that the State Building code supersedes the tenement housing acts would be the equivalent of a statement that Chapter 802 of the Acts of 1972 repealed those acts. No section of Chapter 802 explicitly repeals them, and I find no implied repeal of the tenement acts in Chapter 802. The doctrine of implied repeal is not a favored doctrine. The test of its applicability is whether the earlier statute is so repugnant to and inconsistent with the later enactment that both cannot stand. *In re Gregoire,* 355 Mass. 399 (1969). A system whereby multiple unit residences are subject to two sets of regulations does not necessarily amount to repugnancy and inconsistency. The two bodies of regulation could well be mutually reinforcing. In the absence of any specific allegations of repugnancy, I decline to invoke the doctrine of implied repeal.

The third maxim of statutory construction which leads me to the conclusion that Chapters 144 and 145 continue in effect is the rule that the expression of one thing is the exclusion of another. See *General Electric Co.* v. *Commonwealth,* 329 Mass. 661 (1953); *Richard T. Green Co.* v. *City of Chelsea,* 149 F.2d 927 (1st Cir. 1947). In enacting Chapter 802 the Legislature expressly repealed more than fifteen sections of General Laws Chapter 143 which dealt with the inspection and regulation of buildings. The subject matter of Chapters 143, 144 and 145 is substantially the same, and there is a natural association of the ideas contained in those statutes. Thus, if the Legislature had intended to repeal Chapters 144 and 145 it could have done so explicitly, not by implication. I therefore conclude that there is no legisla-

tive intent to repeal Chapters 144 and 145 manifested in Chapter 802 of the Acts of 1972.

Section 75 of Chapter 802 of the Acts of 1972 (as amended by Section 20 of the Acts of 1974) which states that all " . . . by-laws and ordinances of cities and towns or any special acts in conflict with the State Building Code shall cease to be effective . . ." does not require a contrary result. The acceptance of a statute is accomplished by G.L. c.4, § 4 and is neither a by-law, ordinance, or special act.

For the foregoing reasons, I conclude that there is no overall conflict between the statutes.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 11 July 22, 1975
Ms. Lola Dickerman
Secretary of Consumer Affairs
One Ashburton Place
Boston, Massachusetts 02108

Dear Secretary Dickerman:

You have requested my opinion as to the applicability of G. L. c. 4, § 7, cl. 26, which defines "public records" for the purpose of public disclosure, with respect to such items as letters of complaint, investigatory materials, applications for licensure and examination papers.

The 1973 Amendments to G. L. c. 4, § 7, cl. 26 substantially changed the Public Records Law in Massachusetts by making a presumption that governmental records are public, unless they fall into one of the specific exemptions contained in the statute. Thus, in order to determine whether a particular record is a "public record", it is necessary to determine whether the record falls within any of the specific exemptions contained in G. L. c. 4, § 7, cl. 26. If not specifically exempted, the record is deemed to be public.

In this instance, I lack sufficient factual information to determine whether any of the exemptions contained in section 7 are applicble to the particular records you have cited. For example, you have asked whether Clause Twenty-six requires disclosure of matters of complaint which mention specific individuals. It is impossible to answer such a question without knowing the precise nature of a particular complaint letter. Does it contain medical information? Cl. 26(c). Would its disclosure constitute an invasion of personal privacy? *Id.* Does it contain investigatory materials the disclosure of which would probably so prejudice the possibility of effective law enforcement that such disclosures would not be in the public interest? Cl. 26(f).

At this point, I confront a series of hypothetical questions which are not appropriate for an Attorney General opinion. I Op. Atty. Gen. 273, 275 (1895). I, therefore, must respectfully decline to answer. If you are faced with

a problem involving factual situations which actually confront your agency, I shall be happy to respond to a formal request containing specific questions. See 1966-1967 Atty. Gen. Rep. 112, 114.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 12 July 22, 1975

Mrs. Evvajean Mintz, Director
Division of Registration
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mrs. Mintz:

Your predecessor requested my opinion as to whether Chapter 582, Section 3 of the Acts of 1962, which amended G. L. c. 141, §§ 1 and 8, permits a licensed journeyman electrician, who is also a licensed instructor of the Department of Education, to supervise electrical work performed by students in public or nonprofit institutions if such work is performed without financial remuneration. My opinion is that the statute permits such activity.

The students involved are enrolled at local vocational high schools and, as part of their curriculum, do on-the-job training without pay, for example, at the local town hall or Y.M.C.A. The journeyman electrician acts as an instructor and supervisor of the students while on the job.

Section 3 of Chapter 582 provides as follows:

> "The provisions of sections one and eight of chapter one hundred and forty-one of the General Laws, as amended by sections one and two, respectively, of this act, in so far as they restrict the working by learners or apprentices with and under the direct personal supervision of journeymen electricians shall not apply to employees while they are engaged in an on-the-job training program, so called, conducted in cooperation with an accredited university, college or secondary school . . . ."

The provisions of the General Laws referred to in the quoted passage limit the number of apprentices who may work for a master electrician and a journeyman electrician. See 13 Op. Atty. Gen. 70 (1963); 4 Op. Atty. Gen. 496 (1915). However, Chapter 582 of the Acts of 1962 created an exception to such limitations by permitting the employment of any number of apprentices if they are supervised by a journeyman electrician and are engaged in the on-the-job training program of an accredited school. It is my opinion that the exception applies to this situation.

Since the instructor is licensed by the Department of Education and the program is presumably operated in conjunction with an accredited state vocational high school, the only possible objection to the operation of this

type of program would be the contention that the students are not "employees," under Chapter 582. Since Chapter 141 itself does not require licensure for work done without remuneration, Op. Atty. Gen., Sept. 5, 1973, G. L. c. 141, § 1, it would be pardoxical to require that persons covered by Chapter 582 be employees. Therefore, it is my opinion that the term "employees" does not restrict the operation of Chapter 582, as long as the other requirements of the chapter are met.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 13 July 28, 1975

The Honorable Paul Guzzi
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Guzzi:

You have requested my opinion concerning the relationship between the Director of Campaign and Political Finance and the Commission of Campaign and Political Finance. As Secretary of the Commonwealth you serve as Chairman of the aforementioned Commission, and, therefore, your request is directly related to the performance of your duties. Cf.2 Op. Atty. Gen. 100 (1899). Specifically you have asked:

> "What responsibilities and powers does the Commission have, short of removal of the Director of Campaign and Political Finance, to require reports from the Director and to monitor, investigate and otherwise review and assess performance by the Director of functions assigned to the Director under Chapter 55 of the General Laws?"

After examination of the statutes and pertinent cases, I conclude that the Commission has the power to review and assess the performance of the Director of Campaign and Political Finance, and may request information from the Director for the purpose of carrying out these responsibilities. However, the Commission does not have the power to supervise his activities.

The starting point for any inquiry into the relationship between the Director and the Commission is Chapter 55 of the Massachusetts General Laws. Chapter 1173 of the Acts of 1973, which rewrote Chapter 55, became effective on January 1, 1974. Significantly, it added Section 2A which created the Office of Campaign and Political Finance. The Office was to be headed by a Director, chosen by the Commission. Earlier this year, the Governor signed into law Chapter 151 of the Acts of 1975. This act sought to clarify and resolve certain conflicts that existed within the election laws of this Commonwealth. Both the Commission and the Director retained substantially the same powers they had been granted under Chapter 1173.

The law now provides in pertinent part:

> The state chairman of each of the two leading political parties, the state secretary, and a dean of a law school located in the Commonwealth, to be appointed by the governor as provided hereinafter, shall serve as a commission for the purpose of selecting the director of campaign and political finance . . . The state secretary shall act as chairman of said commission. Selection of the director, who shall be a resident of the Commonwealth, shall be by unanimous vote of the members of the commission . . . Removal of the director shall be at the discretion of the commission, and shall not be reviewable.
> General Laws Chapter 55, Section 3.

The Commission, of which you are chairman, is wholly a creature of statute. It may exercise not only the powers conferred upon it by express legislative enactment, but also those necessarily implied from its express responsibilities. See *City of Cambridge v. Commissioner of Public Welfare,* 357 Mass. 183 (1970). The Supreme Court of the United States has made it clear that powers are necessarily implied only where no contrary legislative intent is possible and not merely where the power would be convenient. *Detroit Citizens' Street Railway Company v. Detroit Railway,* 171 U.S. 48 (1897). While it is not the function of the Department of the Attorney General to provide by interpretation for possible legislative omissions, Opinion Attorney General October 10, 1966, p. 95, it is proper for me to determine what powers, if any, the Commission possesses.

The statute clearly provides that the purpose of the Commission is the selection of a qualified Director. Equally clear is the power of the Commission to remove the Director; such removal is discretionary and ostensibly non-reviewable. Nevertheless, due process requirements indicate that the Commission should not take purely arbitrary action in this area. See *Lucia v. Duggan,* 303 F.Supp.112 (D. Mass. 1969). It is, therefore, incumbent upon you to obtain solid information as a basis for your action or inaction. Thus, the necessary implication of Section 3 of Chapter 55 is that the Commission has the right to review and assess the performance of the Director. This right does not include power to supervise the Director's actions.

Chapter 55 of the General Laws as most recently amended by Chapter 151 of the Acts of 1975 does not explicitly authorize the Commission to require reports from the independent Director; however, it does provide a source for the type of information the Commission needs to intelligently perform its function. Section 3 now provides, *inter alia,*

> The director shall . . . respond with reasonable promptness to requests for information, interpretations and advice presented by candidates, state committees, political committees and members of the public.

This provision is extremely broad and clearly encompasses the Commission. Therefore, the Commission may present requests for information to the Director and he is directed by statute to respond with reasonable promptness to those requests. In responding, however, the Director may not divulge privileged information nor material from hearings conducted pursuant to

Section 3, which is subject to a rule of grand jury secrecy.

I wish to stress the fact that the Director has independent status. Chapter 55 does not contemplate interference with his functions either by the Commission or any other body politic.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 14 July 28, 1975

Mr. James M. Shepard, Director
Division of Fisheries and Game
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Sir:

You have requested my opinion with respect to the proposed full-time use of surplus federal vehicles, which would be driven by your personnel throughout the life of the vehicles. Title and registration, however, would remain with the U. S. Department of Interior. Specifically, you have asked:

> What are the legal ramifications with respect to state liability and to personal liability for injury or property damage in the event one of our drivers is involved in an accident?

It is my opinion that the arrangement you described would not affect the liability of the Commonwealth; but it would affect the ability of an employee to be indemnified by the Commonwealth, as provided for in G. L. c. 12, § 3B, for tortious acts committed while operating those vehicles.

The Commonwealth is not liable for the tortious acts of its agents, employees, public officers, or agencies committed in the performance of their duties. *Glickman v. Commonwealth,* 244 Mass. 148 (1923); *Burroughs* v. *Commonwealth,* 224 Mass. 28 (1916). While the doctrine of sovereign immunity has been recently criticized by the Supreme Judicial Court, *Morash & Sons, Inc.* v. *Commonwealth,* 1973 Adv. Sh. 785, 296 N.E.2d 461 (1973), it would presently protect the Commonwealth from suit in the event of tortious acts caused by an accident in the vehicles you described. Ownership of the vehicles would have no effect on the outcome of such litigation.

The employee's personal liability is also not affected by ownership of the vehicle. The employee remains responsible for his own torts. However, the employee's rights to indemnification under certain circumstances for his torts will be affected by ownership of the vehicles. Section 3B of G. L. c. 12 provides for limited indemnification (up to $10,000) for state officers or employee's right to indemnification under certain circumstances for his torts will be affected by ownership of the vehicles. Section 3B of G. L. c. 12 personnel performing lawfully ordered military duty. Further, "owner" is

generally defined by title to the vehicle, G. L. c. 90,§ 1 and G. L c. 90D, § 1, which in this case would not be the Commonwealth.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 15 July 28, 1975

Mr. Irving J. Risi
Board of State Examiners of Plumbers
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mr. Risi:

Because of the recent increase in the construction of new water and sewage treatment plants, you have requested my opinion on the authority of the Board of Plumbing Examiners to issue rules and regulations for the construction, alteration, repair and inspection of said plants. The Board does not presently inspect or supervise any of the piping or fixtures located within or without the buildings which comprise the water pumping stations and water and sewage treatment plants, but believes that the public welfare may be in jeopardy by the absence of any supervision over the construction, alteration and repair of these buildings. My opinion is that any new rules or regulations in this area require compliance with G.L. c. 30A.

The definition of plumbing, Uniform Plumbers Code at p. 23, and the subsequent interpretations by the Board are in accord with recognized definitions found in Trade publications *(Plumbing Dictionary,* 1st Ed. 1971, American Society of Sanitary Engineering; *National Plumbing Code Handbook,* 1st Ed. 1957) and with case law *(See People v. Osborne,* 269 N.Y.S. 409, 149 Misc. 676; *Ex parte Nichols,* 241 P. 399, 400; 74 Cal. App. 504). However, the supervision of piping and fitting in the buildings associated with water and sewage treatment plants has not, to date, been regulated by any state agency.

The term "regulation" is defined in G.L. c. 30A, § 1 (5) to include "the whole or any part of every rule, regulation, standard or other requirement of general application and future effect, including amendment or repeal thereof, adopted by an agency to implement or interpret the law enforced or administered by . . ." Clearly, the interpretation of the word "plumbing" to encompass the activity you described is a "regulation."

The procedures mandated by Chapter 30A for rule-making, including a public hearing, are particularly appropriate here. The area proposed to be regulated is technical and there may be disagreement among those in the various affected industries as to the necessity or appropriateness for such regulation by the Board. Chapter 142, § 13 requires that such rules and regulations shall be "reasonable, uniform, and based on generally accepted standards of plumbing practice . . . ." Further, G.L. c. 142, § 13 and § 21,

the enabling statute for the promulgation of rules and regulations by the Board, requires approval by the Department of Public Health.

Any opinion which attempts to define the Board's authority in this area would be premature and would require a difficult fact-finding process — a task deemed inappropriate for an Attorney General opinion. 1 Atty. Gen. Op. 273 (1895). I advise you, however, to follow the requirements of Chapter 30A, if you wish to initiate regulation in this area.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 16 July 30, 1975

James M. Shepard, Director
Division of Fisheries and Game
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mr. Shepard:

You have requested my opinion as to an apparent conflict between section 80A and sections 4, 5 and 37 of G. L. c. 131. Section 80A, which was added to c. 131 by c. 796 of the Acts of 1974, restricts the use of steel jaw leghold traps and certain other devices for the capture of fur bearing mammals. Specifically, you have asked the following questions:

1. As presently worded, do any of the four sections (4, 5, 37, 80A) supersede the others?
2. Does the passage of the statutory legislation which dictates open seasons, status of game animals, method of taking, etc. operate so as to subvert the intent of the laws which have traditionally vested the administrative responsibility for resource management and regulation in professional resource people acting as a result of inputs considered at public hearings?

It is my opinion that section 80A clearly takes precedence over the other more general provisions of c. 131. I decline to answer your second question for reasons set forth below.

Section 80A prohibits a person from using a steel jaw leghold trap for the capture of fur bearing mammals except in limited circumstances in or under buildings and in water under certain circumstances.[1] This section seems to

[1] *Section 80A* states in pertinent part:

No person shall use, set, place, or maintain any steel jaw leghold trap on land for the capture of fur-bearing mammals except in or under buildings on land owned, leased or rented by him. The steel jaw leghold trap may be used for the capture of fur-bearing mammals in water only if set in such a manner that all reasonable care is taken to insure that the mammal dies by drowning in a minimum length of time. No other device which is set in such a manner that it will knowingly cause continued suffering to such a mammal caught therein, or which is not designed to kill such a mammal at once or take it alive unhurt shall be used, set, placed or maintained for the capture of fur-bearing mammals; provided however, that a person or his duly authorized agent may apply to the director for a special permit to use such traps, other than the steel jaw leghold trap, on property owned by such person.

be in conflict with other, more general, provisions of c. 131 which delegate considerable discretion to the Director with respect to the trapping of animals.[2]

It is a long standing principle of statutory interpretation that an "earlier statute has no higher standing than the later and may be superseded thereby wholly or in part when such is the clear legislative intent." *Boston Elevated Ry.* v. *Comm.*, 310 Mass. 528, 551 (1942). This principle is particularly applicable where the earlier statute is of general application and the later of specific application. *Pereira* v. *New England Lng. Co.*, 1973 Mass. Adv. Sh. 1207, 1216; *Clancy* v. *Wallace,* 288 Mass. 557, 564 (1934); *Copeland* v. *Mayor and Aldermen of Springfield,* 166 Mass. 498, 504 (1846). When a later enacted statute conflicts with earlier enacted provisions, the priority must be to give effect to the legislative intent in such a way that the later legislative action may not be futile. "The earlier enactment must give way." *Sullivan* v. *Worcester,* 346 Mass. 570, 573 (1963).

Insofar as there is a conflict between various sections of c. 131, the later and more specific provisions of § 80A govern. I find that § 80A adds limits to those imposed by § 37 on the means by which an owner, tenant or any other person may capture a fur bearing mammal. Similarly, the specific provisions of § 80A limit the broad discretion vested in the Director by § 4(2) and § 5. Section 80A, in delineating the narrow circumstances when otherwise prohibited traps may be used or when these traps may be used with the approval of the director is more specific than the general provisions of sections 4 and 5. The clear intention of the legislature was to ban the use of steel jaw leghold traps and similar devices, except as specifically provided in G. L. c. 131, § 80A. Neither the Director nor anyone else may use or authorize the use of such devices except as provided for in that section.

Your second question is inappropriate, since it does not present a legal question but rather a policy question traditionally resolved by the legislature. Your view that such "recent bills filed dealing with matters traditionally reserved to the appropriate state agency officials, constitutes a deliberate attempt to circumvent the normal regulatory process . . .," overlooks the important principle that the legislature, which delegates responsibility to your agency in the first instance, has the power to pass specific statutes which limit or even eliminate your discretion, unless the statute violates some provision of the Massachusetts or United States Constitution.

The Supreme Judicial Court has consistently upheld statutes which further a policy against causing unnecessary suffering to animals. "The general subject of suppression of cruel treatment of animals being within legislative competency, the details in the main must be regarded as within the discretion

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[2] *Section 4, clause 2* empowers the director "notwithstanding any other provisions of this chapter . . . [to] take or in writing authorize other persons to take and possess, . . . mammals at any time or in any manner for purposes of observation, research, control or management and, in his discretion, excuse certain persons so authorized from any licensing provisions of this chapter."

Section 5 directs the director to ". . . make rules and regulations relating to . . . methods of taking. . . ."

Section 37 provides that "An owner or tenant of land . . . [may] hunt or take by any means, except by poison or snare, any mammal which he finds damaging his property."

of the law making power." *Commonwealth* v. *Higgins,* 277 Mass. 191, 195 (1931). While you may disagree with the wisdom of legislation, such as section 80A, it is your duty to enforce it.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 17 July 31, 1975
Mr. Thomas C. McMahon, Director
Division of Water Pollution Control
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Director McMahon:

You have requested my opinion as to whether a city or town can require the issuance of building permits for the construction of water pollution control plants now being erected in various water districts throughout the Commonwealth. I have been informed that the factual situation which prompted your inquiry has become the subject of litigation. *Perini Construction Co.* v. *Foster,* Middlesex Superior Court No. 751642, presents precisely the same issues as the issues presented in your opinion request. Since this matter is now the subject of litigation, it would be inappropriate for the Attorney General to render the opinion which you have requested. *See* 6 Op. Atty. Gen. 438 (1922).

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 18 August 1, 1975
Ms. Evvajean Mintz
Director of Registration
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Ms. Mintz:

You have asked whether various sections in G. L. c. 112, which require applicants to certain boards of registration either to be citizens and/or declare an intention to become citizens, should be enforced in light of the Attorney General's Opinion of June 6, 1975, which concluded that a similar provision regarding pharmacists was unconstitutional.

I have examined the language in the sections you have cited: G. L. c. 112 § 45 (dental); § 73E (dispensing opticians); § 83 (embalming); § 87A (public

accountants); § 87NN (sanitarians); § 87TT (real estate); § 87GGG (electrologists); § 101 (landscape architects); and § 109 (nursing home administrators). While there are some minor differences in language, all sections, except for § 87NN, prohibit a non-citizen from being licensed. Those sections of c. 112 are, therefore, unconstitutionally defective and should not be enforced with respect to the requirement of citizenship. Section 87NN makes no mention of any citizenship requirement, but permits the Board of Registration of Sanitarians to adopt rules and regulations establishing the minimum qualifications which applicants must possess. If any such rules and regulations exclude non-citizens they are similarly unconstitutional.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 19 August 5, 1975

Mr. Ronald J. Fitzgerald
Director of Research
Advisory Council on Education
13th Floor
182 Tremont Street
Boston, Massachusetts 02111

Dear Mr. Fitzgerald:

You have advised me of the Secretary of Education's announced intention not to recommend any Fiscal Year 1976 appropriation for funding the Massachusetts Advisory Council on Education (MACE). In that context, you have requested my opinion with respect to the following two questions:

> 1. So long as the General Court has not acted to abolish the Advisory Council, does the Executive Branch have the power to refuse to recommend any appropriation for an agency mandated by and established pursuant to statute or must it recommend an appropriation in an amount reasonably calculated to enable it to carry out its statutory functions?
>
> 2. So long as the General Court has not acted to abolish the Advisory Council, does the Governor have the power to veto an appropriation made by the General Court to enable the Advisory Council to carry out its statutory functions?

It is my opinion and you are so advised that the Executive Branch may refuse to recommend any Fiscal Year 1976 appropriation for MACE and that, if an appropriation is passed by the General Court, the Governor may veto such an appropriation.

The appropriation of funds is an exclusively legislative function, to be exercised only by the General Court. Mass. Const., Part II, c. 1, §1, art. 4; Mass. Const., Amendments, art. 63, §3; *Baker v. Commonwealth*, 312 Mass. 490, 493, 45 N. E. 2d 470, 472 (1942); *Opinion of the Justices*, 302 Mass. 605, 612-13, 19 N. E. 2d 807, 813 (1939). The Governor has the power and the

duty to recommend what appropriations should be made by the General Court. Mass. Const., Amendments, art. 63, §§2 and 3. However, the Governor cannot determine the actual level of appropriations, since that is a legislative function.

The Massachusetts Constitution is explicit in defining the role of the Executive Branch in the appropriation process. The Governor has the authority and responsibility to recommend a budget to the General Court, containing "a statement of all proposed expenditures of the commonwealth for the fiscal year." Mass. Const., Amendments, art. 63, §2. Second, the Governor has the Constitutional authority to veto any bill which has been passed by the General Court. Mass. Const., Part II, c.l, §1, art. 2. Third, with respect to a money bill, the Governor may exercise either an item veto or a partial item veto. Mass. Const., Amendments, art. 63, §5.

Thus, our Constitution gives the Governor the power to take the actions which you have questioned. It should be noted, however, that the budget recommendation of the Governor is merely a recommendation to the General Court and a veto by the Governor may be overridden by the General Court. The power to appropriate funds remains solely in the hands of the General Court.

The Executive Branch does have the power to refuse to recommend any appropriation for your agency. In refusing to recommend an appropriation for MACE or in vetoing such an appropriation, the Governor would be exercising his constitutionally-granted prerogative. Furthermore, he would be violating no laws, since it is within the power of the General Court to determine levels of appropriation, not the Governor.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 20 August 7, 1975

John F. Kehoe, Jr.
Commissioner of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts 02215

Dear Commissioner Kehoe:

You have requested my opinion on six interrelated questions of law, each of which deals with the employment of licensed engineers or firemen in steam plants. The six questions you have posed are:

1. Is it permissible for a licensed engineer or fireman to be designated as the person in direct charge of a steam plant and to be in direct charge of two or more separate plants which are isolated from each other?
2. If the answer to the above question is "yes", in which steam plant shall the designated engineer or fireman in charge post

his license as required by Section 51 of Chapter 146 of the General Laws?

3. Is it permissible for an engineer or fireman designated as the person in direct charge of a particular steam plant, to also be the designated shift engineer or fireman in charge of a regular tour of duty in another steam plant which is isolated and physically separated from the steam plant in which the person is designated as being in direct charge?
4. If the question posed in question three is permissible, in which steam plant shall the engineer or fireman post his license as required by Section 51 of Chapter 146?
5. Is a xerox or other type of a copy of a license considered a genuine license and as such permitted to be posted as required by Section 51 of Chapter 146?
6. When an engineer or fireman has been designated as the person in charge of a particular steam plant by the owner of the plant, what should be the frequency of his visits to the plant?

The answers to these six individual questions are set out below. However, some general observations about the regulation of steam plants are a necessary prelude to the specific answers.

Since steam is a potentially dangerous agency, courts have consistently held that the production and use thereof are subject to governmental regulation and that such regulation is a valid exercise of the police power. *See Louisville and Nashville Railroad Company* v. *Hughes,* 201 F. 727 (D. Ohio, 1912); *Commonwealth* v. *Breakwater Co.,* 214 Mass. 10 (1913). Massachusetts has chosen to exercise that police power by enacting statutes dealing with both the inspection and operation of steam boilers. See General Laws Chapter 146. The purpose of these statutes is to protect the public by ensuring that steam engines are in proper operating condition and that those operating them have the necessary skill for safe operation. 1962 Op. Atty. Gen. p. 73. The licensing provisions are contained in G.L. c. 146 §§ 43 *et seq.* Violation of any of those licensing provisions is a criminal offense made punishable by fine or imprisonment, G.L. c. 146, Section 55, and, therefore, these statutes can be classified as being penal in nature.

A fundamental proposition of statutory construction is that statutes which are penal in nature must be strictly construed. *Wood* v. *Commission of Correction,* 1973 Mass. Adv. Sh. 225. Where a statute subjects an individual to penalties and is capable of two constructions, the construction which operates in favor of liberty is to be adopted. *Commonwealth* v. *Kenniston,* 22 Mass. 420 (1827). Furthermore, penal statutes are not to be extended by mere implication. *Davey Bros., Inc.* v. *Stop & Shop, Inc.,* 351 Mass. 59 (1969). While I have attempted to give effect to the statutory purpose in answering your questions, I have been guided at all times by this rule of construction. I turn now to your specific questions.

I answer your first question in the affirmative. Chapter 146 contains no provision explicitly prohibiting one fireman or engineer from being desig-

nated as in charge of two facilities. Licenses issued to firemen or engineers pursuant to Chapter 146, Section 64 fall into two categories: special licenses which are valid only for one specific plant and licenses of general application. It is my opinion that a person who holds a license of the second class can be in charge of two plants, but that he is subject to twenty-four hour call at both plants.

Your second question asks where the person in charge of two or more plants is to post his license. You have cited Chapter 146, Section 51 for the proposition that such a license must be posted, but I am of the opinion that that statute is not apt authority for such a posting requirement. That section provides in part:

> "An engineer's or fireman's license shall be so placed in the engine or boiler room of the plant operated by the licensee as to be easily read . . ."

The manifest purpose of those posting provisions is to facilitate enforcement of the Chapter's substantive licensing sections. In turn, the purpose of these statutes is to ensure that a qualified operator is running the steam mechanism whenever it is in use. An earlier Attorney General, citing that purpose, stated that a practice whereby the operating engineer was away from the boiler room on regular inspection tours for fifteen minutes at a time was inconsistent with the purpose of Chapter 146. *See* 1962 Op. Atty. Gen. p. 73. Similar considerations lead me to conclude that the license referred to in Section 51 is that of the engineer or fireman currently on duty and operating the facility, not that of the person in charge.

The third question you have asked is whether or not a person in charge of one plant can work as an engineer (not in charge) at another. I answer it affirmatively for the same reasons that caused me to respond in a positive fashion to the first question. I do so with the warning that under no circumstances may such a person leave a facility running and unattended for any meaningful period without subjecting himself to criminal penalties.

In response to question number four, and for the reasons stated in answer to question two, I conclude that a licensed engineer or fireman who is employed at two or more facilities should post his license in the facility in which he is actually working. Under such circumstances an individual would require only one copy of his license and the use of a xerox copy would not be necessary. However, while a literal reading of c.146, §51 indicates that the law is satisfied only by posting the license itself rather than a duplicate thereof, posting of a copy would not seem to violate the statute if all other requirements are met and the use of copy involves no fraud or other abuse.

Your sixth and final question deals with the frequency and duration of visits to a particular steam plant by the engineer or fireman in charge. I am of the opinion that visits to plants, as described below, should be made on a daily basis but that they need not be of any fixed duration. As authority for the first proposition, I refer to the second sentence of Chapter 146, Section 51 which provides:

> The *person in charge* of a stationary steam boiler upon which the safety valve is set to blow off at more than twenty-five pounds pressure to the square inch, except boilers in private residences,

> boilers in apartment houses of less than five apartments, boilers under the jurisdiction of the United States, boilers used for agricultural purposes exclusively, and boilers of less than nine horsepower, *shall keep a daily record of the boiler, its condition when under steam, and of all repairs made and work done on it upon forms to be obtained upon application to the department.*
> (emphasis added)

While the Legislature appears inferentially to have acquired daily attendance of the person in charge, it has not seen fit to specify the length of those visits. It is not the functon of the Attorney General to provide for legislative omissions when issuing advice to department heads, except in the most obvious cases. 1966 Op. Atty. Gen. p. 95. I, therefore, decline to answer your question pertaining to the hours an engineer need remain in the plant.

In issuing this opinion, I have been concerned only with the legality of the practices you enumerated and have been constrained by a rule of strict construction. The wisdom of particular practices is a matter for the Legislature in a general sense and for the appointing authority in specific cases. I trust that those bodies will exercise their powers in a manner consistent with the purposes of Chapter 146 — protection of the public.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 21 August 7, 1975

Honorable John F. Kehoe, Jr.
Commissioner of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts 02215

Dear Commissioner Kehoe:

You have requested my opinion concerning the applicability of several Massachusetts laws to nonresidents coming into Massachusetts with flintlock or long arm rifles for purposes of participating in the Bicentennial Celebration. Essentially you have made five inquiries:

1. Is the type of weapon to be used, namely flintlocks, muskets, or long arm rifles, exempted from all gun control regulation by G. L. c. 140, § 121(A) and (B)?
2. If not, are the provisions of G. L. c. 269, § 10(a), as most recently amended by c. 113 of the Acts of 1975, applicable to such weapons being carried in the Commonwealth by nonresidents?
3. If G. L. c. 269, § 10(a) is applicable, how is it affected by G. L. c. 140, § 129C (r) and (s)?
4. Is a nonresident coming into Massachusetts with a flintlock, musket, or long arm rifle required to obtain a temporary license to carry firearms under the provisions of G. L. c. 140, § 131F?

5. Is the firing of said weapons and the storage of ammunition for them by a nonresident subject to the provisions of G. L. c. 149, § 9 and the Board of Fire Prevention Regulations?

In response to your first question, G. L. c. 140, § 121 exempts certain weapons [hereinafter antique weapons] from regulation under G. L. c. 140, §§ 122-129D and §§ 131A, 131B, 131E, if they were manufactured before 1899 or are replicas of weapons manufactured prior to 1899 and if they meet the other specific requirements in section 121(A) or (B). The exemption allows antique firearms, rifles, or shotguns to be kept at home or in one's place of business without any special permit, license or card being required. However, this exemption for purposes of possession or ownership of a firearm, shotgun or rifle does not satisfy the provisions of G. L. c. 269, § 10(a), which regulates the *carrying* of firearms, shotguns, rifles and the antique weapons which are the subject of your inquiry (as discussed below). Thus, G. L. c. 140, § 121(A) or (B) does not exempt antique weapons from all gun control regulation.

With regard to your second question, the coverage provisions of G. L. c. 269, § 10(a), as most recently amended by c. 113 of the Acts of 1975, essentially provides that whoever carries on his person or under his control in a vehicle, a firearm, a rifle or shotgun, loaded or unloaded, shall be subject to the regulatory provisions of the section. It is my opinion, based upon section 10(a) and upon the language of G. L. c. 140, § 121, that G. L. c. 269, § 10(a) is applicable to flintlocks, muskets, and long arm rifles.

With respect to your third question, G. L. c. 140, § 129C (r) and (s) provide for exemptions from the provisions of G. L. c. 140, §§ 129B-129C in the case of:

> (r) Possession by a veterans' organization chartered by the Congress of the United States or included in clause (12) of section five of chapter forty and possession by the members of any such organizations when on official parade, duty or ceremonial occasions;
>
> (s) Possession by federal, state and local historial societies, museums, and institutional collections open to the public, provided such firearms, rifles or shotguns are unloaded, properly housed and secured from unauthorized handling.

These exemptions apply, on their face, only to ownership or possession of firearms and not to their transportation. Therefore, they do not, by themselves, affect carrying questions under G. L. c. 269, § 10(a) except as pointed out in the answer to your fourth question.

In answer to your fourth question, the nonresident is required by G. L. c. 269, § 10(a) to obtain a "temporary license to carry" issued under G. L. c. 140, § 131F unless he meets the requirements of G. L. c. 140, § 131G and falls within the exemptions of G. L. c. 140, § 129C(r) or (s). Please note that this exception applies only to firearms as defined in G. L. c. 140, § 121 and not to shotguns and rifles.

With respect to your fifth question, it is my understanding that the antique weapons in question utilize both black and smokeless gunpowder and inert

projectiles. It is my opinion that the firing of these weapons is a "use" of gunpowder within the contemplation of and thus regulated by G. L. c. 148, § 9. Similarly, to the extent the gunpowder used for firing these weapons is kept for future use or after past use, it is "stored" for purposes of regulation under G. L. c. 148, § 9. Specifically, I refer you to the applicable Department of Public Safety Board of Fire Prevention Regulations.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 22 August 18, 1975
Honorable William F. Hogan
Chairman, Committee on Public Safety
House of Representatives
Room 482, State House
Boston, Massachusetts 02133

Dear Representative Hogan:

As Chairman of the House Committee on Public Safety, you have requested my opinion as to whether eight branch offices of the Registry of Motor Vehicles may be terminated by executive action. In particular, you refer to "a recommendation made by Secretary of Public Safety, Charles V. Barry and Governor Michael Dukakis."

The Attorney General is required to "give his opinion upon questions of law submitted to him by the governor and council or by either branch of the general court." G. L. c.12, §9. Upon request of a legislative committee, the Attorney General also may be required to give his advice concerning the legal effect of proposed legislation pending before such committee. *Id. See also,* 1941 Op. Atty. Gen. 56; § Op. Atty. Gen. 75 (1926).

Because your request does not presently meet these requirements, I must respectfully decline to answer.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 23 September 8, 1975
Mr. Edward A. McColgan
Executive Director
Massachusetts Bicentennial Commission
10 Tremont Street
Boston, Massachusetts 02108

Dear Mr. McColgan:

You have requested my opinion concerning the legal ability of the Commission to purchase insurance for articles of property it obtains in light of G.L. c.29, §30, which provides:

> No officer or board shall insure any property of the Commonwealth without special authority of law.

Specifically, you have asked:

1. Does this statute prohibit the Massachusetts Bicentennial Commission, a special legislative commission established by Chapter 71 of the Resolves of 1964, from insuring the items of equipment it purchases and/or is given in connection with the Bicentennial observances?
2. Does this statute prohibit the Massachusetts Bicentennial Commission from insuring equipment and property which is only loaned to it in connection with the Bicentennial observances, and which is therefore not "property of the Commonwealth?"

I shall consider your questions in the order presented.

1. *Purchased and/or donated property.* The Commission was established by the Legislature and is an agency of the state. Title to property purchased by the Commission or unconditionally donated to it vests in the Commonwealth. 6 Op. Atty. Gen. 636 (1922). Therefore it seems clear that such property constitutes "property of the Commonwealth" within the scope of G.L. c.29, §30.

The meaning of G.L. c.29, §30 was considered by the Attorney General in 1964-1966 Op. Atty. Gen. 100, 101 (1966). That opinion involved a request by the Massachusetts Executive Committee for Educational Television as to whether it could insure the Committee's furniture and equipment. The Attorney General concluded that it could not, stating:

> The General Court has clearly determined that the Commonwealth is to be a self-insurer of its property. The authority to insure the Commonwealth's property must be specifically granted by the Legislature. Authorization of this nature does not appear in the statutes which govern the Executive Committee. . . . . Chapter 29, Section 30 can only be limited by the enactment of a specific provision authorizing a given officer or board to purchase insurance; absent such special authorization, the expenditure of funds for insurance by officials of the Commonwealth is precluded.

An examination of the enabling statute for the Massachusetts Bicentennial Commission reveals no special authorization for the purchase of insurance by the Commission. Chapter 71 of the Resolves of 1964 established the "commission . . . to devise plans and programs for the observance by the commonwealth of the bicentennial . . . . Said commission may receive and expend such funds as may be donated to it for its purposes." This language merely empowers the Commission to expend funds to devise plans and programs for the Bicentennial. It cannot be construed as a specific authorization to purchase insurance.

Because the property referred to in your first question is property of the Commonwealth and because the Commission lacks specific legislative authorization to purchase insurance, it is my conclusion that M.G.L. c.29,

§30 prohibits the Commission from insuring said property. 1967-1970 Op. Atty. Gen. 124, 126 (1966); 1957-1962 Op. Atty. Gen. 46 (1961).

2. *Loaned property.* Title to such property remains in the owner rather than the Commonwealth, and hence, such property does not appear to fall within the express scope of G.L. c.29, §30. Furthermore, as the Opinion of the Attorney General quoted above states, §30 represents a determination by the Legislature that the Commonwealth shall act as a self-insurer for its own property, absorbing losses caused by damage to or destruction of such property rather than obtaining commercial insurance to cover them. This rationale is inapplicable to property loaned to the Commonwealth. Any loss resulting from damage to or destruction of loaned property while in the temporary possession of the Commonwealth would continue to fall on its owner if insurance is not purchased.

Because neither the express language of the statute nor its underlying rationale support a construction that would include loaned property within its scope, I conclude that the Massachusetts Bicentennial Commission is not prohibited by G.L. c.29, §30 from purchasing insurance for such property.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 24 September 8, 1975

Joseph Serio, Chairman
Board of Trustees of the University of Lowell
One Boston Place
Boston, Massachusetts 02108

Re: Collective Bargaining Agreement with *Professional and Non-Professional Employees*

Dear Mr. Serio:

In your capacity as Chairman of the Board of Trustees of the newly established University of Lowell, you have requested my opinion as to the legality of certain existing collective bargaining agreements originally entered into between professional and non-professional employees of Lowell State College and Lowell Technological Institute and the respective Boards of Trustees of the two institutions. The three agreements which you have asked me to review are the following: 1) agreement between the Lowell State College Faculty Federation and the Board of Trustees of State Colleges, with expiration date of June 30, 1976 (professional); 2) agreement between Massachusetts Society of Professors at Lowell Technological Institute and the Board of Trustees of Lowell Technological Institute which also expires June 30, 1976 (professional); and 3) agreement between the National Association of Government Employees, Local R1-233 and the Board of Trustees of Lowell Technological Institute, which expired June 30, 1975 (non-professional).

The University of Lowell was established by the merger of Lowell State College and Lowell Technological Institute pursuant to St. 1973, c. 1175. The effective date of the merger was June 9, 1975. Section 10 of c. 1175 provides that upon completion of the merger, the University's Board of Trustees "shall be vested with all the powers, rights and privileges and shall be subject to all the duties of the trustees" of the two merged institutions. "All property, real or personal and all rights" held by the Trustees of the former institutions are transferred to the University's Board. This section plainly contemplates that the Board of Trustees of the University will succeed automatically to any on-going contracts entered into by their predecessors, including the three collective bargaining agreements involved here. Moreover, § 12 of c. 1175, which provides for the transfer of "[t]he administrators, faculty, professional, and non-professional employees" of the two merged institutions to the University's staff, expressly states that all the rights and benefits of these employees shall not be affected by the merger. The specific "rights" listed in the statute include salary level, tenure, retirement, insurance and workmen's compensation coverage, all of which are treated within and governed by the terms of the three agreements. Compliance with § 12 of c. 1175 thus implies — and indeed, appears to require — the continued validity of the collective bargaining agreements.

In summary, on the basis of my review of the three collective bargaining agreements and of the governing merger statute, it is my opinion that the two "professional" agreements have continued in effect beyond the effective date of the merger and are currently binding on the Board of Trustees of the University of Lowell. Similarly, the "non-professional" agreement constituted a valid and binding obligation of the University's Trustees until its expiration date of June 30, 1975.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 25 September 9, 1975
Senator Walter J. Boverini
Chairman, Committee on Education
Massachusetts Senate
State House
Boston, Massachusetts 02133

Re: *Senate Bill No. 2030*

Dear Senator Boverini:

The Committee on Education has requested my opinion as to whether the provisions of Senate Bill No. 2030 conflict with the Conflict of Interest Statute, G. L. c. 268A.

The Bill would amend G. L. c. 15, § 20A, which establishes the Board of Trustees of State Colleges and prescribes the qualifications of the Board

members, to provide that such Board shall also include as a member "a president of a state college chosen annually by the presidents of state colleges."

I have concluded that the proposed amendment conflicts with G. L. c. 268A, § 23A. That section provides in relevant part:

> No trustee of any public institution of higher education operated by the commonwealth shall be eligible to be appointed to or hold any other office or position with said institution for a period of three years next after the termination of his services as such trustee . . . .

Under the express terms of the section, a member of the Board of Trustees of State Colleges could not serve as the president of any state college for three years following his or her term of office as Trustee. Clearly, implicit in the section is also a prohibition against a Trustee's holding the office of president *during* his or her term. My opinion is that the provisions of Senate Bill 2030, which permits the president of a state college to serve on the Board of Trustees of State Colleges, conflicts with G. L. c. 268A, § 23A.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 26 September 10, 1975

Mr. Arthur Sweeney
Fleet Administrator
Motor Vehicle Management Bureau
Executive Office of Administration and Finance
State House
Boston, Massachusetts 02133

Dear Mr. Sweeney:

You have requested my opinion with respect to who may be permitted to operate state-owned vehicles for authorized travel on official business. Specifically, you have asked:

1. What is the definition of an 'officer or employee of the Commonwealth'?
2. Are the following within the definition of being an 'officer or employee of the Commonwealth'?
    a. Legislators
    b. Constitutional Officers and their staffs
    c. Legislative personnel
    d. Persons employed by the Judiciary Branch
    e. Persons appointed to various commissions and their staffs.

The words "officer" and "employee" are found in G. L. c. 12, § 3B which

provides limited (up to $10,000) indemnificaton for such persons if driving a motor vehicle owned by the Commonwealth. Permission to drive a state-owned vehicle does not, however, bind the Commonwealth under Section 3B to indemnify the driver. However, since uncertainty as to coverage of that section may well present practical problems, I will attempt to provide some clarification.

An officer of the Commonwealth is a person "whose duties are in their nature public, that is, involving . . . the exercise of some portion of the sovereign power . . . ." *Attorney General* v. *Drohan,* 169 Mass. 534, 535 (1897); *accord Attorney General* v. *Tillinghast,* 203 Mass. 539, 543 (1909). Obviously, legislators and constitutional officers are officers of the Commonwealth.

The definition of employee is much broader. Generally, if a person is subject to control and supervision, he is an employee of the person for whom he is performing the service. *Griswold* v *Director, Division of Employment Security,* 135 Mass. 371 (1944). There are, however, specific statutes which define "employee" for particular purposes. General Laws c. 268A (1) (conflict of interest), G. L. c. 178G (labor relations law) and G. L. c. 152, § 1(4) (workmen's compensation) all define "employee" somewhat differently. Compare, *Commonwealth* v. *Antonelli,* 345 Mass. 518, 521 (1953).

Since there are no statutes concerning the question you raised, I must compare the positions you listed with the general common law definition. The staff of constitutional officers and legislative personnel seem to clearly fall within the definition of "employee". However, with respect to judicial personnel and persons appointed to various commissions and their staffs, I would require their precise job descriptions, titles and salary sources before rendering an opinion as to their status as officers or employees of the Commonwealth.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 27 September 24, 1975

Malcolm E. Graff, P.E.
Associate Commissioner
Department of Public Works
100 Nashua Street
Boston, Mass. 02114

Dear Mr. Graff:

You have requested my opinion with regard to your duty as Commissioner of Public Works, to examine all dams to insure that they do not pose a threat to the public's safety pursuant to C. 595 of the Acts of 1970.

You have examined and found unsafe and in need of immediate repair the Great Barrington-Monument Mills Dam, owned by Richard S. Pope. You have mailed a certified letter to him, return receipt requested, stating the

condition of the dam and your duties should he fail to comply. He did not respond. You have recorded the results of the examination and the notices sent to Mr. Pope in the official records of the Division of Waterways in the Department of Public Works and at the Southern Berkshire Registry of Deeds.

Based on the above facts and due to the potentially dangerous situation involved, you have requested my opinion as to whether all the procedural requirements of C. 595 of the Acts of 1970 have been followed. Specifically, you pose the following questions:

1. The most upstream mill building which is unused and must be entered appears to be unsafe. The use of equipment and explosives are needed to accomplish our purpose and may cause damage to the building itself or other property owned by Mr. Pope. What is the Department's responsibility under the circumstances?
2. Since the Department is without the owner's permission to enter upon the property and take the necessary action, your opinion and guidance is requested in this regard.

Section 46 of Chapter 595 of the Acts of 1970 in pertinent part states:

> If upon such examination the structure is not, in the judgment of the Commissioner, sufficiently strong to resist the action of the water under any circumstances which may reasonably be expected to occur, he shall determine and direct what alterations or repairs are required to make the structure permanent and secure and shall in writing order the owners thereof to make such alterations or repairs within a reasonable time . . .

The statute requires that notice be given to the owner of the structure determined to be unsafe. Due process requires notice and an opportunity to raise objections. *Strange* v. *Powers,* 358 Mass. 126, 260 N.E.2d 704 (1970); *Sullivan* v. *Croquette,* 420 F.2d (1st Cir. 1969); *Mullane* v. *Central Hanover Bank and Trust Co.,* 339 U.S. 306 (1950). In emergency situations the formal hearing can be held afterward. *Wall* v. *King,* 206 F.2d 878 (1st Cir. 1953). Your question is whether the notice you have given Mr. Pope fulfills due process requirements for such emergencies.

Adequate notice should be given to the owner of the conditions of the dam and the necessary repairs. Your letter to Mr. Pope, dated February 20, 1975, differs materially from the action you intend to take, as indicated in your letter to the Attorney General requesting an opinion and, therefore, a court might find it to be inadequate notice. For example, in the letter to Mr. Pope, you did not mention the intended use of explosives to repair the dam. Instead, you instructed him to "open the gates wide and clear the water passages there and downstream, through the mill to the return outlets to the river." Because Mr. Pope may not be aware of the extent of the repairs you intend to make, you should mail another certified letter, return receipt requested, to Mr. Pope. It should contain a description of the condition of the dam, a more specific statement of the repairs and alterations necessary to return the dam to a secure and safe condition, the action you are required to take should he fail to comply, his obligation to pay for such repairs and

alterations and the effect your actions may have on his surrounding property. You should then allow him a reasonable time to reply to your letter or repair the dam.

In summary, my answer to your first question is that if Mr. Pope fails to respond within the time allotted, you may perform the necessary repairs and alterations and assess the cost to him. Second, since this is an emergency situation, once adequate notice has been given, the express permission of the owner is not necessary and you may proceed with the necessary work.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 28 September 24, 1975

Ms. Anne Prell
Secretary
Milk Price Control Commission
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear. Ms. Prell:

You have requested my opinion concerning the procedures to be followed by the Milk Control Commission in order to discharge the Director of the Division of Milk Control, who is a veteran as defined by M.G.L. c. 31, § 21, and who has held such position for not less than three years, when said Director has refused to resign after having been requested to do so by an official vote of the Commission.

The Director of the Division of Milk Control is appointed by the ". . . commission, subject to the approval of the governor and council . . ." G.L. c. 20, § 8. The approval of the council is no longer required as St. 1964, c. 740, § 3, repeals so much of c. 20, § 8, as requires such approval and the approval of the council to the appointment or removal of the Director is not required by the constitution of the commonwealth. While other employees of the commission are subject to civil service, the Director is not. St. 1941, c. 691, § 4. He can only be removed by the original appointing authority, which is the commission, subject to approval by the governor. See 1946 Op. Atty. Gen. 75; St. 1964, c. 740, § 3. The extent, if any, which the Veterans' Tenure Act, G.L. c. 30, § 9A, alters this situation is the issue raised by your request. G.L. c. 30, § 9A, provides civil service protection to veterans, as defined by G.L. c. 31, § 21, who hold:

> . . . an office or position in the service of the Commonwealth not classified under chapter thirty-one, other than an elective office, an appointive office for a fixed term or an office or a position under section seven of this chapter, and has held such office or position for not less than three years . . .

The position of Director is neither subject to chapter thirty-one, an elec-

tive office, an appointee for a fixed term, nor a confidential secretary under c. 30, § 7. "It has already been decided that the protection of the act does not necessarily extend to every position which is not expressely excluded from its provisions." *Cieri* v. *Commissioner of Insurance,* 343 Mass. 181, 185 (1961); also, see *Sullivan* v. *Committee on Rules of the House of Representatives,* 331 Mass. 135, 137 (1954). Furthermore, c. 30, § 9A, does not apply to those positions authorized by a statute whose provisions manifest an intention on the behalf of the Legislature that c. 30, § 9A, should not apply. *Hanley* v. *Commissioner of Insurance,* 355 Mass. 784 (1969).

The language of the appointing statute, G.L. c. 20, § 8 is similar to G.L. c. 26, § 7, which was interpreted in *Hanley* v. *Commissioner, supra,* so as to make veterans' tenure inapplicable. Although G.L. c. 20, § 8 does not refer to removal, it has been interpreted to implicitly do so. 1946 Op. Atty. Gen. 75. While other statutes specifically preclude the application of § 9A (e.g., G.L. c. 16, § 4; G.L. c. 16, § 3A, these provisions were all passed *after* the enactment of § 9A; G.L. c. 20, § 8 was promulgated in 1941, five years before the Veterans' Tenure Act. The lack of a specific reference to § 9A is probably, therefore, without significance. In any event, as noted above, the inquiry must go beyond the language of the enabling statute.

The Supreme Judicial Court has interpreted § 9A to be inapplicable in circumstances similar to those presented by your request. For example, the court in *Cieri, supra,* found it improbable that the legislature intended by § 9A to make permanent a position which had been created to serve at the pleasure of the Commissioner of Insurance. Nor did the court in the *Sullivan* case believe § 9A clothed the employee from the ability of a legislative committee to replace him and, therefore, have its policies reflected in its internal management.

The position of Director arguably fulfills similar functions. It is the chief administrative position of the Milk Control Commission and has the primary responsibility for carrying out its policies. The legislature may not have intended to forever bind the Commission with a Director and require that the detailed procedures of civil service be utilized for removal. Absent "good cause" for removal this would result in the inability of future Commissioners to fully implement its policies. See *Hanley, supra; Cieri, supra; Sullivan* v. *Committee on Rules of the House of Representatives, supra.* See also, *Regan* v. *Commissioner of Insurance,* 343 Mass. 202 (1961).

However, while it may be that Veterans' Tenure Act is inapplicable, the legal issue is, quite frankly, extremely close and one where prior opinions of the Supreme Judicial Court might be factually distinguished.

The most conservative and sound course for the appointing authority to follow, would be to grant a hearing of the type referred to in c. 31, § 43, even though it may not be a strict legal necessity. While there is substantial authority which indicates that such a hearing might not be required, the issue is not free from doubt. (See cases cited, *supra.*) For this reason, my view is that in the commission's written notice of the hearing, it should explain to the Director that this hearing should not be construed as an admission by the commission that the Director is covered by c. 30, § 9A, that the commission expressly reserves the right to challenge in any future administrative or

judicial proceeding any allegation that the Director is covered by c. 30, § 9A, and that the hearing was provided by the commission only as a matter of grace.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 29 September 29, 1975

Elton B. Klibanoff, Director
Office for Children
120 Boylston Street
Boston, Massachusetts 02116

Dear Mr. Klibanoff:

You have requested my opinion on whether the investigator appointed in care and protection proceedings under M.G.L. c. 119, § 24, has the same responsibilities as a guardian ad litem for purposes of federal regulations issued pursuant to the federal Child Abuse Prevention and Treatment Act (P.L. 93-247).[1] I understand that you have sought my opinion because clarification of this point is a necessary pre-condition to your office receiving a federal grant under said Act.

In Massachusetts, the guardian ad litem is appointed by the Probate Court pursuant to General Laws c.215, § 56A, in cases involving the care, custody or maintenance of minor children. Investigators are appointed in care and protection proceedings under General Laws, c. 119, § 24 and perform a similar role. Since the federal regulations offer no definition of "guardian ad litem", it is necessary to examine the functions of both positions in order to answer your question.

The function of the guardian ad litem in Probate Court proceedings is set out principally in General Laws c.215, § 56A:

> . . . to investigate the facts in any proceeding pending in said court
>
> . . . said guardian ad litem shall, before final decree in such proceeding, report in writing to the court the results of the investigation . . .

The report of the guardian ad litem is entitled to such weight as the court sees fit to give it. *Jones v. Jones,* 349 Mass. 259, 297 N.E.2d 922 (1965). While the role of the guardian ad litem is obviously somewhat different in a case involving a minor's interest in real or personal property and then where the

[1]The regulations promulgated by the U.S. Department of Health, Education and Welfare require:

The State must provide that in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem shall be appointed to represent the child in such proceedings. The requirement of this clause may be satisfied by a State law or by a legal opinion of the State's Attorney General holding that such appointments can be made, and by a statement from the Governor that such appointments are made, in all cases. Such guardian ad litem need not be an attorney; however, such representative may be an attorney charged with the presentation in a judicial proceeding of the evidence alleged to amount to the abuse and neglect, so long as his legal responsibility includes representing the rights, interests, welfare and well-being of the child; where such appointments are made the legal opinon of the State Attorney General must specify that such attorney has said legal responsibility. (45CFR section 1340.3-3(d) (7) published at 39 Federal Register P. 43940, December 19, 1974).

guardian is representing the minor (see *Tyson v. Richardson*, 103 Wis. 397, 79 N.W. 439 (1899)) in a proceeding involving the care and custody of a minor, the guardian's duties clearly include the investigation of facts.

When a care and protection petition if filed, General Laws c. 119, § 29 requires the appointment of counsel for the child if the court determines that the interests of justice require it. Most courts do, in fact, appoint counsel for the minor in care and protection proceedings. Even where counsel is not appointed, there are adequate safeguards for the minor's interest which satisfy and, even go beyond, the requirements of the federal regulations you cite.

When the Department of Welfare initiates a judicial proceeding to protect a child who has been the subject of an abuse and neglect, petition under General Laws c. 119, § 51A, Section 51B provides for the filing of care and protection petitions in the appropriate district and juvenile court, pursuant to General Laws c. 119, § 24. The interests of the child are protected, in the first instance, by the duty imposed on the Department of Welfare. See General Laws c. 119, § 51B. In fact, the entire thrust of the recently amended legislative scheme is to

> . . . insure that the children of the Commonwealth are protected against the harmful effects resulting from the absence, inability, inadequacy, or destructive behavior of parents or parent substitutes . . . General Laws c. 119, §1.

The duty of the Department in such proceedings, therefore, includes "representing the rights, interests, welfare and well-being of the child." 45 C.F.R. 1340 3-3(d) (7). But, as an additional protection for the child, the court is required to appoint an investigator (General Laws c. 119, § 24). Such an investigator is usually trained as an expert on child welfare and is an agent of an approved charitable corporation or agency substantially engaged in the protection of children, as provided in M.G.L. c. 119, § 21. In addition to reporting purely factual information obtained during the investigation, the investigator also makes a recommendation as to what he or she believes to be the best course for the court to pursue in protecting the welfare and well-being of the child. The report of the investigator, which is made under oath, is entitled to such weight as the judge considers appropriate. This is the same standard that applies to the report of the guardian ad litem under c. 215, § 56A. Compare *Jones v. Jones, supra.* Because of the qualifications of the investigator under c. 119, § 21, the findings of fact and the recommendation of the investigator are accorded great weight by the juvenile courts. In short, the central function of the investigator is to present facts and recommendations to the court to protect the rights, welfare, well-being and interests of the child.

Upon examination of the role of the investigator in care and protection proceedings under c. 119, § 24, and the purpose of chapter 119, it is my opinion that the investigator is the equivalent of a guardian ad litem for purposes of such proceedings under the laws of this Commonwealth.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 30 September 30, 1975

The Honorable Paul Guzzi
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Guzzi:

You have requested my opinion on the proper construction of Chapter 139 of the Acts of 1975. Specifically, you ask:

> Does the phrase "signed by a majority" as used in Sections 1 and 2 of Chapter 139 of the Acts of 1975 require that a majority of the individual registrars in each city and town each personally sign their names by hand to certification of voters on nominaton papers and to the enrollment certificates (of voters), or may signature facsimile stamps, bearing one or more signatures of the registrars, be used for these purposes?

I am of the opinion that Chapter 139 requires that a majority of the registrars personally certify signatures, but that it does not alter the mode of certification. I, therefore, conclude that facsimile stamps may be used by the registrars and that the personal handwritten signatures of individual registrars are not required.

The word "signed" is a word of art and should, therefore, be interpreted according to its technical, legal meaning. See *School Committee of Springfield v. Board of Education,* 1972 Mass. Adv. Sh, 1543. The leading case on the meaning of the term is *Finnegan v. Lucy,* 157 Mass. 439 (1892), in which the Supreme Judicial Court stated the general rule that a handwritten signature is not required whenever a statute uses the word "signed." On the contrary:

> . . . a signature in the proper handwriting of a person (is required) only in those cases where, by express language, or by usage, or by implication arising from the nature of the document to be signed, a written signature is required by law . . .

This standard has been repeatedly followed in this Commonwealth not only in cases involving official acts of state officers, but also in contract cases. See *Assessors of Boston v. Neal,* 311 Mass. 192 (1942); *Irving v. The Goodimate Co.,* 320 Mass. 454 (1946).

Your request indicates both that the long-standing practice has been to accept facsimile stamps and that to hold otherwise would impose a severe burden on the registrars. Therefore, under the standard imposed by *Finnegan v. Lucy,* only express statutory language would warrant a finding that a handwritten signature is required. There is no such express statutory language in Chapter 139 of the Acts of 1975. In fact, an examination of the legislative history of that chapter reveals an intent not to require such a handwritten signature.

On April 17, 1975, the Governor signed House Bill 5698 into law as Chapter 139. That Bill has been substituted in the House for Bill 557. The earlier House Bill provided in substance:

> All certifications on nomination papers and enrollment of voters certificates shall be signed *personally* by a majority of the board of registrars of voters or election comissioners. (emphasis added).

Chapter 139 as enacted differs from the earlier bill, primarily in the fact that the word "personally" was deleted. Had the legislature intended to require a handwritten signature, they could have done so either by leaving the term "personally" in the statute or by other express language. They did neither, and I, therefore, conclude that a facsimile stamp is a valid signature for the purposes of Chapter 139.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 31 September 30, 1975

Dr. William E. Perrault
Executive Director
Massachusetts State Lottery Commission
15 Rockdale Street
Braintree, Massachusetts 02184

Dear Dr. Perrault:

You have informed me that a question dealing with the issuance of licenses for "beano" games was not submitted to the voters in eight Massachusetts towns in 1975. Failure to submit that question in 1975 is apparently a violation of Section 4 of Chapter 486 of the Acts of 1971, as amended by Chapter 244 of the Acts of 1974 which required that the question of beano licenses be placed on the ballot in 1975. You have posed four specific questions raised by the failure to submit the question on beano games to the public. I shall treat those questions separately and in the order you presented them.

Your first question is whether or not the eight towns which failed to submit the matter to their local voters are required to hold a special election in 1975 on the "beano" question. Section 4 of Chapter 486 provides that the matter shall be presented to the voters in Cities and Towns "in the same manner" as in 1971. I interpret this phrase to mean not only that the question is to be in the form prescribed by statute, but also that it is to be submitted at a "regular city or annual town election." The General Laws recognize a distinction between special and regular elections. (See e.g. G.L.c. 54, §103A, c. 55, §16) and in this case the General Court has declared that the beano question is to be decided at a regular election. I, therefore, answer your first queston in the negative — the eight towns are not required to hold a special election in 1975.

I also answer "no" to your second question, which asks in substance whether the beano question *must* be submitted at the next annual town election. The legislature apparently failed to contemplate the possibility that the beano question would not be before the voters in some municipalities in 1975 and, therefore, failed to provide specifically for such an eventuality.

While the best approach to the problem may well be to require these eight towns to consider beano at their next annual election, the law as it currently exists does not contain such a requirement. The function of an Opinion of the Attorney General is to interpret existing law and not to provide for legislative omissions. (See 1966 Opinion, Attorney General p. 95). If the legislature now desires to impose such a requirement they can do so by amendment, but I will not insert such a requirement by this opinion.

Although Chapter 486 states that the beano question can be resubmitted starting in 1979, I am of the opinion that the matter may be submitted at the 1976 annual town elections. I, therefore, answer your third question, whether or not the beano question "may be submitted at the next annual town election," in the affirmative. I reach this conclusion for two reasons. First, Chapter 486 manifests an intent to have the licensing of beano games approved or disapproved by local voters. Second, that chapter affects normal initiative procedures only in that the question can be submitted no more often than every four years. Given these two basic facts, I conclude that the beano question may be submitted to the voters at 1976 annual town elections.

Your fourth question asks whether or not licenses granted on November 1, 1975 for beano games in the eight involved towns are effective for a full year until October 31, 1976. I answer this question "no", because the vote taken in those towns in 1971 only authorized beano games until December 31, 1975. Games held after that date would not be duly licensed because underlying authority for the games would be lacking. If this result seems unduly harsh and licensees appear to be punished because of the inadvertance of town clerks in failing to place the beano question before the voter in 1975, I can only suggest that a legislative response may be appropriate.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 32 October 1, 1975

The Honorable Paul Guzzi
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Guzzi:

You have requested my opinion on several interrelated questions of law, each dealing with the steps you may take to implement Chapter 600 of the Acts of 1975. That act was approved by the Governor on September 11, 1975 and further regulates the presidential primary.

Your request is occasioned by the fact that although Chapter 600 contains no emergency preamble and will not take effect until December 10, 1975, it contains several provisions which would require action prior to that date. Your specific questions are:

1. May I properly send the attached letter with enclosures to all municipal clerks and election commissioners?
2. May I properly send the attached letter with enclosures to all city and town committee chairmen?
3. May I properly award a contract for the printing and delivery of ballots to be used at the presidential primary?
4. May I properly take such other steps as are presently necessary in order to administer and implement the provisions of Chapter 600 of the Acts of 1975 when it becomes effective?

I answer each of your questions affirmatively, but qualify each with the following caveat. The determination of the effective date of a statute is a function of either the General Court or the Governor under the 48th Amendment of the Massachusetts Constitution. Neither the Secretary of State, in administering the election laws, nor the Attorney General, in rendering opinions, may provide for legislative errors of omission or commission. While you may take all steps necessary to implement Chapter 600 when it becomes effective, you may therefore take no steps which would advance the effective date of that statute.

Furthermore, during the brief period which has elapsed since you requested this opinion, an action has been commenced in Suffolk Superior Court bearing the caption *Sears, et al* v. *Secretary of the Commonwealth,* Civil Action 9693. Among the issues raised by the complaint is the effective date of Chapter 600. It is ordinarily deemed inappropriate to issue an Opinion of the Attorney General dealing with matters currently in litigation. See 6 Op. Atty. Gen. 438 (1922). I issue this opinion, however, because it is consistent with the position of the plaintiffs and an actual controversy may not exist between the parties. To the extent that the court enters contrary orders regulating your conduct in this matter, those orders will be binding upon you.

I arrive at these conclusions only after a review of the pertinent statutory and case law. As the Secretary of the Commonwealth, you are the state official ultimately charged with the administration of election laws. Chapter 10, Massachusetts General Laws, *Socialist Workers Party* v. *Davoren,* 378 F. Supp. 1245 (D. Mass. 1974). Consequently, you are empowered to implement the "details of legislative policy" not specifically spelled out in Chapter 600. *Cleary* v. *Cardullo's, Inc.,* 347 Mass. 337 (1964). I am of the opinion that you have the inherent authority to inform the public of the steps necessary to comply with an election law which will take effect in December. You may do so by letter along the lines suggested in Questions (1) and (2). Moreover, the award of a contract for printing contemplated in Question (3) is a "detail of legislative policy" and is also permissible.

To the extent that your fourth question does not specify the steps you intend to take to administer and implement Chapter 600, it is in the nature of a hypothetical question. I cannot respond to this abstract question in a specific fashion. I therefore answer only by saying that while you may not set policy, you may implement the implicit details of that policy.

The effective date of a statute is not a mere detail of legislative policy.

Kagan v. *United Vacuum,* 357 Mass. 680 (1970); *Coyle* v. *Swanson,* 345 Mass. 126 (1962). Until the time arrives when a statute is effective, all acts purporting to have been done under its authority are void. To the extent that the political parties and individuals voluntarily comply with the new filing dates as well as the old, their actions will be under the authority of pre-existing statutory scheme and will be valid. This further underscores the fact that it is the pre-existing statutory scheme which is controlling until December 10, 1975. You may take no steps to implement Chapter 600 which are inconsistent with this proposition.

I recognize that this opinion may leave you on the horns of a dilemma; as a practical matter it may be impossible to conduct a presidential primary on March 2, 1976 unless the effective date of Chapter 600 is advanced. The mailings you suggest are one possible solution to the problem posed, but any real solution is a matter for further law-making. It is my opinion that only an additional act, either by the Governor or the General Court, advancing the effective date of Chapter 600, will alleviate the problem.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 33 October 3, 1975

Charles J. Dinezio
Executive Director
State Building Code Commission
141 Milk Street
Boston, Massachusetts 02109

Dear Mr. Dinezio:

By letter dated June 13, 1975 you have requested my opinion on two questions relative to the relationship between the State Building Code, the Local inspection statutes (G. L. c. 166, § 32, c. 142, §§ 11, 13 and c. 25, § 12H) and the rules and regulations promulgated by such State Administrative boards as the Examiners of Electricians, the State Examiners of Plumbers, the Gas Regulatory Board, and the Board of Fire Prevention Regulation.

Your first inquiry is whether the various boards referred to have authority to amend their respective rules, regulations and codes to preempt local inspection of manufactured buildings, building components and mobile homes. This question I answer in the affirmative.

Your second question is whether in the event of a conflict between the rules, regulations and codes of the above-named state boards and the provisions of the State Building Code, the authority of these boards or of the State Building Code Commission would be paramount under Section 67 of Chapter 802 of the Acts of 1972 [hereinafter Chapter 802] and Section 75 of Chapter 802 as amended by Section 20 of Chapter 541 of the Acts of 1974 [hereinafter Chapter 541]. This second question, I respectfully decline to

answer in the absence of a concrete factual situation presenting an actual conflict.

In answering your first question, it is necessary to examine the statutory language relating to the State Building Code contained in Massachusetts General Laws, Chapter 23B, § 16 et seq. Section 17 (h) of G.L. c. 23 provides that the State Building Code Commission shall have the power and duty "to revise and amend the state building code . . ." Similarly, G. L. c. 23B, § 20 provides in part that "specialized codes . . . . shall be amended only by those respective boards, commissions, departments or agencies, authorized to do so by law." In contrast to these clear grants of power to the Commission and to the various boards to amend or revise aspects of the building codes, the language of the local inspection statutes (G.L. c. 166, § 32, G.L. c. 142, §§ 11 and 13 and G.L. c. 143, § 30) grants no such power.

For example, G.L. c. 166, § 32 provides in part:

> . . . Such [wire] inspector shall supervise every wire over or under streets or buildings in such city, town or district and every wire within a building designed to carry . . . current . . .; *and shall see that all laws and regulations relative to wires are strictly enforced* . . . (emphasis added)

Similarly, G. L. c. 142, § 11 provides in part:

> . . . Said inspector of plumbing shall inspect all plumbing in process of construction, alteration or repair for which permits are granted within their respective cities and towns . . . *They shall perform such other duties as may be required.* (emphasis added)

Finally, G. L. c. 143, § 3(0) provides in part:

> . . . said [gas] inspector *shall enforce the rules and regulations adopted by the board established under Section 12H of Chapter 25.* (emphasis added)

As is apparent, nothing in these sections gives the various inspectors the power to make any rules or regulations. Indeed, c. 143, § 3(0) specifically refers to the inspectors as having the duty to enforce rules and regulations adopted by the board. While the other sections are somewhat less explicit it seems clear that the various local inspectors not only lack power to make their own rules but in addition are required to carry out the rules made by their respective boards. Thus, it is my opinion that both the State Building Code Commissioners and the various regulatory boards may amend their respective rules, regulations and codes to pre-empt local inspection of manufactured buildings, building components, and mobile homes.

Although I decline to answer your second question, a brief analysis of the relevent legislation might be helpful. Section 67 of Chapter 802 of the Acts of 1972 provided that (1) the state building code commission should hold public hearings for the purpose of adopting a state building code; (2) at the conclusion of said hearings the commission should promulgate a state building code; and (3) effective January 1, 1975, the code would be binding in all cities and towns notwithstanding any special or general laws to the contrary.

G. L. c. 23B, § 19 (c. 802, § 1) provides that:

> The state building code shall incorporate any . . . codes, rules or

> regulations pertaining to building construction, reconstruction, alteration, repair or demolition promulgated by and under the authority of the various boards which have been authorized from time to time by the general court [including] . . . the state plumbing code, electrical code, fire safety code and elevator code.

The only limitation on the incorporation of these specialized codes, (see also G. L. c. 143, § 1) rules and regulations appears in Section 75 of Chapter 802 (as amended by Section 20 of Chapter 541 of the Acts of 1974). As amended Section 75 provides that:

> All by-laws and ordinances of cities and towns [or regulations promulgated by any state boards, commissions, agencies or departments or any special acts or any specific regulations promulgated by a local official under section twenty-eight of chapter one hundred and forty-eight of the General Laws] in conflict with the State Building code shall cease to be effective on January first, nineteen hundred and seventy-five. (amended by language in brackets).

Originally, section 75 covered only by-laws and ordinances of cities and towns which conflicted with the state building code. The language in brackets, which was added by the amendments in question, seems clearly to invalidate all regulations promulgated by the various boards prior to January 1, 1975 which conflict with the provisions of the Code. This result is consistent with the general objectives of the commission, as enunciated in c. 20, § 18, to promote the "elimination of restrictive, obsolete, conflicting and unnecessary building regulations which may increase the cost of construction . . ." Thus, any regulations enacted by the various boards prior to January 1, 1975 which conflicted with specific provisions of the Building Code were rendered null and void by Section 75 effective January 1, 1975.

By invalidating those pre-existing provisions of the specialized codes which conflicted with the Building Code, Section 75 greatly reduced the potential conflict between the specialized Codes and the Building Code. Nonetheless, a significant potential for such conflict still exists. Originally, G.L. c. 23B, § 20, provided that those specialized codes incorporated into the Building Code were to be amended by the Building Code Commission without any further notice or hearing to conform to any amendments by their respective boards. By Section 4 of c. 541, Acts of 1974, the legislature amended G.L. c. 23B, to provide:

> *Except for the specialized codes,* as defined by section nineteen, *which codes shall be amended only by those respective boards, commissions, departments or agencies authorized to do so by law,* the state building code may be amended at any time by an affirmative vote of the majority of the members at a regular or special meeting of the commission. (emphasis added)

The clear purpose of this amendment appears to have been to clarify the legislative intent to vest solely in the various boards and commissions the power to amend the specialized codes. However, G.L. c. 23, § 17(h) makes

clear that the State Building Code Commission shall have the sole power and duty

> To revise and amend the state building code *exclusive of the specialized codes* referred to in section nineteen at least once every five years . . . . (emphasis added)

This division of amending authority between the various boards on the one hand and the Building Commissioners on the other clearly gives rise to the possibility that amendments made by one body will conflict with amendments made by another. Whenever possible such conflicts should be reduced by reconciling apparently conflicting provisions, *cf. Goldsmith* v. *Reliance Insurance Company*, 353 Mass. 99 (1969). Failing this, it would of course be necessary to determine whether regulations promulgated by the State Building Code Commission have precedence over regulations promulgated by the various boards. Unfortunately, your opinion request does not set forth facts indicating an actual existing conflict between specific provisions of the Code or regulations enacted pursuant thereto and regulations enacted by the various boards. "It is traditional that opinions of the Attorney General are rendered solely upon factual situations which actually confront a given State Department or agency, and not upon hypothetical questions or general requests for information." *Op. Atty. Gen.* 112, 114 (Dec. 23, 1966). Thus, I respectfully decline to answer your second question. However, if a specific problem arises involving an actual or apparent conflict, I shall be happy to respond to a formal request containing the particular questions.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 34 October 8, 1975

Edward F. Harrington
Alcoholic Beverages Control Commission
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mr. Harrington:

You have requested my opinion as to the legality of proceedings being conducted by the Commission in the matter of *J & J Enterprises, Inc., et al* v. *Ralph Kaplan, et al.* Two of the three commissioners have disqualified themselves from hearing the evidence. Specifically, you have asked:

(1) Whether a single Commissioner can render a decision?

(2) If he is legally disabled from rendering a decision, what steps should be followed which would allow a legal decision to be rendered in this matter?

In answer to the first question, it is my opinion that at least two members of the Commission must make the decision in the proceedings before you. The Alcoholic Beverages Control Commission was created by G.L. c. 6, §43, to consist of three members. Chapter 138, § 64 gives licensing authorities the

power, after notice to the licensee and reasonable opportunity to be heard to modify, suspend, revoke or cancel a license for violation of its conditions or for violation of any law of the Commonwealth. It also charges the Commission with the authority to revoke a license which, after notice to the licensing authorities and the holder of the license and opportunity to be heard, it finds was issued in excess of certain statutory quotas. "Licensing authorities" is defined by c. 138, § 1 as "the commission or the local licensing authorities, or both, as the case may be." It is the Commission then, rather than any single member, which is charged with taking action under c. 138, § 64.

Mass. G.L. c. 4, § 6, paragraph fifth, provides a general rule for construing statutory words which give joint authority to or direct any act by three or more public officers or persons. It provides for construction of such words to give authority to a majority of the officers or persons. Analogously, a quorum of the local licensing board, also composed of three members, is set at two. G.L. c. 138, § 6. At common law, it has been held that in the absence of express provision, boards may act by the majority of their number, and if all members have been given an opportunity to act, a determination by a majority of a quorum is binding. See *Real Properties, Inc.* v. *Board of Appeal of Boston,* 311 Mass. 430, 42 N.E.2d 499, 502 (1942) and cases cited. Since in the case of the ABCC one member could be neither a majority nor a majority of a quorum, I conclude that two members must concur in any act to be taken by the Commission.

You have asked what steps should be taken to enable a legal decision to be made in the matter pending before you. I have found no explicit provisions regarding substitution for a member of the Commission who has disqualified himself. Two statutory provisions do exist regarding designation of substitutes for state departments, boards and commissions, however it is my opinion that neither section is applicable to the ABCC.

M.G.L. c. 30, § 6A allows permanent members of state boards or commissions who serve as such by virtue of holding any other office or position to designate an officer or employee of his department to perform his duties during the member's absence or disability. However, ABCC members are not serving by virtue of their holding some other position. See 1967-68 Opinion of the Attorney General 40.

M.G.L. c. 30, § 6 provides:

> If, during the absence or disability of a commissioner or head of an executive or administrative department or of a director or head of a division in a department, his duties are not specially authorized by law to be performed by another person, the commissioner or head of such department shall designate another person in his department to perform the duties of such person in case of and during such absence or disability, but a person so designated shall have no authority to make permanent appointments or removals. Every such designation shall be subject to approval by the governor, and shall remain in force and effect until revoked by the commissioner or head of such department or by the governor; provided, however, that such designation shall

> continue after the death of such commissioner or head of department until revoked by his successor.

A prior opinion of the Attorney General has read this language as it refers to a "commissioner" to cover only commissioners of executive or administrative departments, as the word "department" is defined in c. 30, § 1. 1965-66 Opinion of the Attorney General 392. This reading is consistent with the substance of the statute, which allows designation of a substitute from the disabled person's department. G.L. c. 30, § 1 defines the word "departments" as used in c. 30 as "all the departments of the commonwealth . . . . and also including the metropolitan district commission and each of the executive offices established by chapters six A and 7." The phrase "all the departments of the commonwealth" has a technical meaning that is well defined. It refers to the twenty state departments which were authorized by article LXVI of the amendments to the Massachusetts Constitution. Specifically excluded from organization into departments by that amendment were commissions serving directly under Governor or council, such as the ABCC. For a full discussion of the meaning of the phrase "departments of the commonwealth", see 1966-67 Opinion of the Attorney General 240; 1965-66 Opinion of the Attorney General 392; 1967-68 Opinion of the Attorney General 40.

It is therefore my conclusion that the legislature has left a gap in providing for the substitution for absent or disabled members of commissions who do not serve ex officio, a gap into which the ABCC falls.

Where the legislature has conferred upon only one body the power to act in a particular proceeding and has made no provision that some other officer or body act when the board is disqualified due to bias or prejudice, a "rule of necessity" is sometimes invoked. This rule allows disqualified officers to make decisions when no provision is made for a substitute tribunal. This is a harsh rule, which has been critized. Davis, Administrative Law Text § 12.05. But when there is no alternative, the public interest requires that the board not be powerless to act. *Mayor of Everett* v. *Superior Court,* 324 Mass. 144 (1949); *School Committee of Boston* v. *Finance Commission of Boston,* 1973 Mass. Adv. Sh. 1306. In order to avoid injustice from the action of a board that may be biased, reviewing courts is some states will review decisions made under the rule of necessity more broadly and intensively than the usual scope of review. Davis, Administrative Law Text § 12.05; *Komyathy* v. *Board of Education,* 75 Misc. 2d 859, 348 N.Y.S. 2d 25 (Sup. Ct. 1973).

Assuming that a second member of the commission will decide this proceeding, the question remaining is whether evidence can be heard by less than a quorum of the Commission and a legal decision rendered based on that evidence.

M.G.L. c. 30A, § 11, which regulates the conduct of state administrative proceedings, specifically contemplates that decisions may be made in cases where a majority of the officials of the agency who are to render the decision have not heard evidence. Subsection (7) provides:

> (7) If a majority of the officials of the agency who are to render the final decision have neither heard nor read the evidence, such decision, if adverse to any party other than the agency, shall be

> made only after (2) a tentative or proposed decision is delivered or mailed to the parties containing a statement of reasons and including determination of each issue of fact or law necessary to the tentative or proposed decision; and (b) an opportunity is afforded each party adversely affected to file objections and to present argument, either orally or in writing as the agency may order, to a majority of the officials who are to render the final decision. The agency may by regulation provide that, unless parties make written request in advance for the tentative or proposed decision, the agency shall not be bound to comply with the procedures of this paragraph.

Presumably the second member rendering a decision will read transcripts of the evidence taken by the single commissioner. Arguably this subsection would then not apply. However, to the extent that the taking of evidence by a single Commissioner, less than a quorum of the Commission, might be attacked on the due process grounds, the procedure outlined in c. 30A, § 11 (7) would help assure the parties a final opportunity to be heard on the matter through written objections and argument.

The majority of the cases considering the question have held that an administrative decision is valid if made or participated in by an officer not present when the evidence was taken. *Morgan* v. *United States,* 298 U.S. 468 (1936); *Laughlin* v. *Public Utilities Commission,* 6 Ohio St. 2d 110, 216 N.E. 2d 60 (1966); cases collected at 18 ALR 2d 606.

There are a few Massachusetts cases which quashed decisions made after hearings in which some voting members had not participated. *Perkins* v. *School Committee of Quincy,* 314 Mass. 47 (1943); *Sesnovich* v. *Board of Appeal of Boston,* 313 Mass. 393 (1943). However, these were cases of statutory interpretation of strictly drawn statutes, and would not control over the necessary implication of M.G.L. c. 30A, § 11 (7).

It is my opinion that one of the two disqualified Commissioners should be required to decide this proceeding under the rule of necessity. Since Commissioner Farnsworth did not feel that he was biased or prejudiced toward any of the parties, but disqualified himself solely to avoid the appearance of impropriety, he would appear to be the logical second Commissioner to decide the proceeding. It is also my opinion that evidence received by a single commissioner may be validly considered, if those commissioners making the decision read the transcript and all evidence taken. It is my recommendation that the commission follow the procedures set out in M.G.L. c. 30A, § 11(7) in rendering its decision.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 35 October 14, 1975

Charles V. Barry
Secretary
Executive Office of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts

Dear Secretary Barry:

You have joined with the Registrar of Motor Vehicles in requesting my opinion on three questions of law arising from Chapter 593 of the Acts of 1975. That act purported to defer the effective date of certain other laws regulating the operation of heavy vehicles on the ways of the Commonwealth. Chapter 593 was declared to be an emergency law and took effect, by its own terms, on September 1, 1975. Diverse interpretations of that act cause you to inquire:

> "1. Is Section 8 of Chapter 494 of the Acts of 1975 presently effective?
>
> 2. Which paragraphs found in Section 19A of Chapter 90, as amended by Chapter 851 of the Acts of 1974, Chapter 494 of the Acts of 1975, and considering Chapter 593 of the Acts of 1975, are presently operative?
>
> 3. Is the Restraining Order issued by the Federal Court, in the case of *Hallamore Motor Transportation, Inc., et al* vs. *David J. Lucey, Registrar of Motor Vehicles, et al,* applicable to either Chapter 851 of the Acts of 1974, as amended, or Section 19A of Chapter 90 as amended by Section 9 of Chapter 494 of the Acts of 1975?"

I am of the opinion that Section 8 of Chapter 494 of the Acts of 1975 is presently effective. Chapter 494 contained an emergency preamble and, except as otherwise provided within that Chapter, took effect upon approval by the Governor. Chapter 593 does suspend the operation of certain sections of Chapter 494, but section eight is not among them. On its face, Chapter 593 suspends only the operation of Chapter 851 of the Acts of 1974 as amended by Chapter 494. I am of the opinion that section eight and all other sections of Chapter 494 which do not amend Chapter 851 were not suspended by the more recent enactment of Chapter 593. I, therefore, answer your first question affirmatively.

My answer is supported not only by the literal language of the statute, but also basic principles of statutory construction. The doctrine of implied revocation (or suspension) of a statute is a disfavored doctrine. If the General Court had intended to suspend the operation of Chapter 494 in its entirety or section eight in particular, it would have done so explicitly rather than implicitly. See *Doherty* v. *Commissioner of Administration*, 349 Mass. 687 (1950); Op. Atty. Gen. 1954-55, p. 85.

My answer to your second question necessarily follows from the preceding material. All sections of Chapter 494 which are not expressly made effective at some future date and which do not amend Chapter 851 of the Acts of 1974 are currently effective.

Your third question is not a matter of statutory construction. It turns instead on the effect of court orders. It is my understanding that the case referred to in your request was dismissed after the enactment of Chapter 494 of the Acts of 1975. The temporary restraining order issued by Judge Aldrich which accompanied your request has not survived the dismissal of that case and is no longer effective. I, therefore, answer your third question in the negative.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 36 October 20, 1975

Honorable Paul Guzzi
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Guzzi:

You have requested my opinion with respect to the legality of compensating the five deputy secretaries under your predecessor's administration for accrued vacation time subsequent to their termination of employment in state service.

State employee vacation rights and procedures are governed by the official rules and regulations of the Director of Personnel (the so-called "Red Book") as authorized by G.L. c. 7, § 28. Rule LV-1 of the Red Book permits employees to accrue vacation time and Rule LV-8 permits compensation where such vacation time is earned, but not used due to termination of employment. Thus, if the five Deputy Secretaries are subject to the provisions of the Red Book, they are entitled to compensation for their accrued vacation time and I so find.

Rule G-5 provides that all employees of the executive branch are subject to the rules contained in the Red Book, except for 1) officers of the Commonwealth, 2) elected officials, 3) employees in the offices of the Governor, Lieutenant Governor, and the Governors' Council, 4) members of Boards, Commissions or Committees established by statute, or 5) any other person whose salary is "expressly provided for by law in a manner other than by rules and regulations of the Director of Personnel and regulations of the Director of Personnel and regulations of the Director of Personnel and Standardization."

The only category possibly relevant to your request is deputies as "officers of the Commonwealth" for purposes of the rules. Ordinarily this term is defined by considering factors which are somewhat vague and difficult to define, such as whether the persons involved "have and exercise some of the powers of the Commonwealth." *See Brown v. Russell,* 166 Mass. 14 (1896). *See Also Attorney General v. Tillinghast,* 203 Mass. 539 (1909). However, the Red Book does not require that this common law definition be used. Instead,

it defines "officer of the Commonwealth" itself, for purposes of the rules that follow. Under this definition, to be an officer one must be the head of a department in a job "whose appointment must have Governor and Council approval." Rule G-6. Plainly, no Deputy Secretary of the Commonwealth is head of a department or subject to Governor and Council approval. Thus, none of the five deputies is an officer of the Commonwealth. *Accord,* 1957 Op. Atty. Gen. p. 85.

Since all five deputies are subject to the regulations of the Director, my opinion is that all are entitled to the benefit of the vacation accrual provisions set forth in the Red Book.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 37 October 17, 1975

Gregory R. Anrig
Commissioner of Education
Department of Education
182 Tremont Street
Boston, Massachusetts 02111

Dear Commissioner Anrig:

You have requested my opinion as to whether those provisions of Chapter 766 of the Acts of 1972, Mass. G.L. c.71B, §1 *et seq.* requiring that, in specified instances, local school systems place special-needs students in appropriate programs in private institutions, violate the Anti-Aid Amendment, Mass. Const. Amend. Art. XVIII. The Anti-Aid Amendment proscribes the use of public money or property *"for the purpose of* founding, maintaining or aiding any . . . institution, primary or secondary school . . . which is not publicly owned. . . ." Mass. Const., Amend. Art. XVIII (emphasis supplied).

The same day you requested this opinion, an action was commenced in the Superior Court for Hampden County, *Sullivan* v. *Sullivan* (Civil Action No. 75-2155). One issue raised in that suit is whether the provisions of Chapter 766, requiring placement in private institutions of students who are not "deaf, dumb or blind," violate the Anti-Aid Amendment of the Massachusetts Constitution. It has been a long-standing policy of this Department not to issue an Opinion of the Attorney General dealing with matters currently in litigation. 6 Op. Atty. Gen. 438 (1922). I must, therefore, respectfully decline to render an opinion in response to your request.

Although I have declined to issue a formal opinion, please be assured that we disagree with the position of the plaintiffs in *Sullivan* as to the constitutionality of Chapter 766. The determination of the constitutionality of Chapter 766 will depend on the purpose of special education programs authorized by that statute. In a recent opinion request, I was asked whether Chapter 1196 of the Acts of 1973 violated the Anti-Aid Amendment. Because the purpose of Chapter 1196 was to support local textbook programs and not a

purpose prohibited by the Anti-Aid Amendment, I found no constitutional barrier to the loan of textbooks to private school pupils. *Opinion of the Attorney General* (June 12, 1975).

The General Court has included in Chapter 766 the following statement of the purpose of the statute:

> it is the purpose of this act to provide for a flexible and uniform system of special education program opportunities for all children requiring special education; to provide a flexible and nondiscriminatory system for identifying and evaluating the individual needs of children requiring special education; requiring evaluation of the needs of the child and adequacy of the special education program before placement and periodic evaluation of the benefit of the program to the child and the nature of the child's needs thereafter; and to prevent denials of equal educational opportunity on the basis of national origin, sex, economic status, race, religion and physical or mental handicap in the provision of differential education services. Acts of 1972, c.766, §1.

The Supreme Judicial Court has accepted this as an accurate statement of legislative purpose, pointing out that: "The entire thrust of c.766 is the establishment of a comprehensive and complete program of evaluation and placement for children with special education needs." *Board of Education* v. *Assessor of Worcester*, 1975 Mass. Adv. Sh. 2626, 2632 (August 18, 1975).

Because Chapter 766 does not have as its purpose the founding, maintaining or aiding of private institutions, the intent prohibited by the Anti-Aid Amendment, we will vigorously defend the constitutional challenge raised in the *Sullivan* case; and I will take whatever other actions may be necessary to obtain compliance by all school committees with the provisions of Chapter 766.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 38 October 21, 1975

Honorable Keith R. Rodney
Deputy Commissioner of Insurance
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mr. Rodney:

You have asked for an opinion of the Attorney General relative to a proposal to destroy obsolete claim reports and closed claim files of the Fraudulent Claims Board.

General Laws c. 30, § 42 sets out the procedure whereby the Records Conservation Board authorizes destruction of obsolete state records. I suggest that you apply to that Board for a destruction schedule and permission to destroy the records you mentioned.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 39 October 27, 1975
Stephen Weekes, Register
Registry of Deeds
Barnstable County
Barnstable, Massachusetts 02630

Dear Mr. Weekes:

Pursuant to G. L. c. 184, § 33 you have submitted for my approval certain regulations for the administration of the public restriction tract index at the Barnstable Registry of Deeds. The original regulations were approved by my predecessor on June 11, 1974, and the amendments now proposed reflect certain modifications and additions to the regulations which you believe would be of benefit to the Registry and the public.

I hereby give my approval to the amended regulations. They are consistent with the provisions of c. 184, § 33. I also note that you have incorporated in them several of the suggestions made by government officials, conservationists and other persons interested in the Conservation Restriction Act, which were listed in my predecessor's original letter of approval.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 40 October 31, 1975
Commissioner Owen L. Clarke
Department of Corporations and Taxation
100 Cambridge Street
Boston, Massachusetts

Dear Commissioner Clarke:

Your predecessor in office has sought my opinion on a question of law arising from the request of the Town of Scituate for approval of a temporary loan in anticipation of reimbursement from the Commonwealth. Specifically, he asked whether or not such approval is proper in light of provisions

of General Laws Chapter 44 Section 8C[1] and Chapter 132A, Section 11.[2] I am of the opinion that neither of these two statutes precludes approval of this temporary loan and answer his question by saying the loan may be approved. The facts of that particular transaction and my reasoning are laid out below.

The Town of Scituate, at a duly called special town meeting, voted to appropriate $1,850,000.00 to purchase or take by eminent domain approximately 570 acres of land, parcel 6 of which was designated for purposes of conservation. The appropriation was allocated among the various parcels, and the town treasurer was authorized to borrow certain sums to meet the appropriation.

Paragraph 3 of the vote by the town allocated $217,000.00 of said appropriation to the acquisition of said parcel 6 for purposes of conservation. It authorized the Scituate Conservation Commission to contract for reimbursement by the Commonwealth as provided in General Laws, Chapter 132A, Section 11. In the event the Commonwealth agreed to reimbursement, paragraph 3 also authorized the Treasurer (with the approval of the Selectmen) to borrow the sum equal to such reimbursement and issue therefor bonds and notes of the town payable within two years from their dates under General Laws, Chapter 44, Section 8C and to borrow the balance of $217,000.00 and issue therefor bonds and notes of the town payable within 20 years from their dates under Chapter 44, Section 7(3).

Thereafter, the Scituate Conservation Commission submitted an application for "Self-Help" funds to the Department of Natural Resources under Chapter 132A, Section 11, of the General Laws. The Department of Natural Resources gave preliminary approval to the Scituate application in the amount of $107,500.00 and has encumbered that amount for the Scituate project.

Your predecessor refused to approve the loan under these circumstances, contending that Chapter 132A, Section 11 requires "an unconditional funding for the total amount of the project before an absolute commitment may be made by the Department of Natural Resources pertaining to a reimbursement." That section makes no reference to "unconditional funding". It does, however, impose certain conditions which must be met by the municipalities

[1]General Laws, Chapter 44, Section 8C provides, inter alia:

"A city or town which has appropriated money for the acquisition of land, to be expended together with a sum of money allotted by the Commissioner of Natural Resources under section eleven of chapter one hundred and thirty-two A or by the United States or by both, may, if said city or town is required primarily to pay a portion of the expense of acquiring such land which is to be reimbursed by the Commonwealth or the United States or both, incur debt outside its debt limit in the amount of such reimbursable expense and may issue notes therefor which shall be payable in or within two years from their dates; provided, that prior to the issuance of such notes such reimbursement has been agreed upon by the Commonwealth or the United States or by both; and provided, further, that the proceeds of such reimbursement shall be applied to the payment of the notes without further appropriation, notwithstanding the provisions of section fifty-three - - - -".

[2]General Laws, Chapter 132A, Section 11, provides, in pertinent part:

"The commissioner shall establish a program to assist the cities and towns, which have established conservation commissions under section eight C of chapter forty, in acquiring lands and in planning or designing suitable public outdoor facilities as described in section two B and two D. He may . . . reimburse any such city or town for any money expended by it in establishing an approved project under said program in such amount as he shall determine to be equitable in consideration of anticipated benefits from such project, but in no event shall the amount of such reimbursement exceed fifty per cent of the cost of such project. No reimbursement shall be made hereunder to a city or town unless a project application is filed by such city or town with the commissioner setting forth such plans and information as the commissioner may require and approved by him, nor until such city or town shall have appropriated, transferred from available funds or have voted to expend from its conservation fund, under clause fifty-one of section five of chapter forty, an amount equal to the total cost of the project, nor until the project has been completed, to the satisfaction of the commissioner in accordance with said approved plans . . ."

in order to obtain reimbursement. On December 12, 1969, then Attorney General Robert Quinn summarized those conditions in an opinion to the Commissioner of Natural Resources in the following language:

> "those conditions are (1) that a project application be filed with the Commissioner in conformity with the requirement of section 11; (2) that the city or town 'shall have appropriated, transferred from available funds or have voted to expend from its conservation fund . . . an amount equal to the total cost of the project'; and (3) that the project be completed." *1969-1970 Op.Atty.Gen. 83, 85.*

There can be no controversy over two of these three conditions. It is clear that a project application has been filed and that the project itself is not completed. The sole basis for dispute, therefore, is whether or not Scituate has satisfied the second condition enunciated in that opinion. I conclude that the town has appropriated money for the project in an amount equal to its total cost and can anticipate reimbursement.

The phrase "to appropriate" is a term of art which must be afforded its technical meaning. Our Supreme Judicial Court has said that to appropriate money "is to set it aside or assign it to a particular purpose or use." *Kelley* v. *Sullivan,* 201 Mass. 34 (1909), and "to set apart from the public revenue a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object and no other." *Opinion of the Justices,* 323 Mass. 764, 766 (1949). The vote taken at the Scituate town meeting was a vote to set aside a particular amount of money and assign it a particular use. Scituate has appropriated an amount equal to the total cost of the project so that Chapter 132A, Section 11 has been satisfied. I conclude that under the particular circumstances of this case, Scituate is entitled to the approval by the Director of Accounts of a temporary loan in anticipation of reimbursement.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 41 November 10, 1975

Honorable Paul Guzzi
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Guzzi:

You have requested an opinion as to whether a sticker containing your name and signature can be placed over your predecessor's printed name and signature on certain form certificates to which the Secretary of the Commonwealth must attest by affixing his signature and the Great Seal of the Commonwealth. You further ask whether certificates to which such stickers have been attached would be admissible as evidence in state and federal court.

It is my opinion that the placing of a sticker with your name and signature over those of your predecessor would not affect the validity of the documents and that such documents would be admissible as evidence in both state and federal court.

The answer to your questions depends upon whether the sticker containing your name and signature constitutes a legally valid "signature" on the documents. It is well settled law in the Commonwealth that "signing does not necessarily mean a written signature, as distinguished from a signature by mark, by print, by stamp, or by the hand of another." *Finnegan v. Lucy,* 157 Mass. 439, 443 (1892). What is important is that the person whose name appears on it "intended to authenticate the paper as his act." *Irving v. Goodimate Co.,* 300 Mass. 454, 459 (1946). *See also* 1940 Op. Atty. Gen. p. 41.

The law in other jurisdictions is similarly clear. "A signature may be written by hand, printed, stamped, typewritten, engraved, photographed, or cut from one instrument and attached to another . . . it being immaterial with what kind of instrument a signature is made." *Joseph Denunzio Fruit Co. v. Crone,* 79 F. Supp. 117, 128 (S.D. Cal. 1948), *aff'd,* 188 F. 2d 569 (9th Cir. 1951), *cert. den.* 342 U.S. 820 (1951). In short, the general thrust of the common law is that "a signature" is whatever mark, symbol or device one may choose to employ as representative of himself. *Griffith v. Bonawitz,* 73 Neb. 622, 627, 103 N.W. 327, 333 (1906).

Attaching the stickers with your name and signature to the certificates in question is, therefore, the equivalent of your signing those certificates, as long as it is done with your knowledge and consent. Even if the documents were considered to be altered, they would remain admissible, since the "alterations" do not change the essential meaning of a document. *Pahigin v. Manufacturers' Life Insurance Co.,* 349 Mass. 78, 84-85 (1965).

In federal court, admissibility of these certificates is further supported by the Federal Rules of Evidence. As public documents bearing your signature and the Seal of the Commonwealth, the certificates are admissible without any extrinsic evidence of their authenticity. Fed. Rules Evid. 902(1). Where the document is a copy of an official record, it is likewise admissible in federal court when authenticated by your signature and the Seal. Fed. Rules Evid. 1005. Finally, the certificates would not be excluded by the hearsay rule, even if you are available to be a witness at the time admission of the certificates in evidence is sought. Fed. Rules Evid. 803(8).

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 42 November 10, 1975

Honorable Paul H. Guzzi
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Guzzi:

You have requested my opinion regarding the following questions:

1. Is an application for a license to carry firearms authorized by Mass. G.L. c.140, § 131 a public record within the meaning of G.L. c.4, § 7?
2. Is an application for a firearm identification card authorized by Mass. G.L. c.140, § 129B a public record within the meaning of Mass. G.L. c.4, §7?

All government forms are public records unless they fall within one of the exemptions listed in Mass. G.L. c.4, § 7. There are two exemptions relevant to determining the status of these applications:

(a) [Documents] specifically or by necessary implication exempted from disclosure by statute;

(c) . . . . personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an invasion of personal privacy.

The determination of whether the application for a firearms license is exempt depends upon the information contained therein.

The form forwarded to this office as a sample of the application for a license to carry firearms is that used by the Police Department of the City of Boston. The face of this form contains questions requiring the applicant's name, address, occupation, place of birth, and other factual biographical information. Most of this information would be available on other public records, such as applications for motor vehicle operators' licenses. The form also requests the applicant's reasons for wishing to carry arms. Disclosure of this information would not, in my opinion, be an invasion of personal privacy. Therefore, any portion of a license application containing such information is not exempt under G.L. c.4, § 7(c) and is a public record.

The reverse of the sample form, however, carries a column entitled "Police Report". To the extent that this column requires information as to the applicant's criminal history, any such information would be exempted from disclosure by clause (a), above, and by the Criminal Offender Record Information Act, Mass. G.L. c.6, § 172. It is my opinion that any portion of such a license application which contains criminal offender record information is not a public record and can only be released to persons certified by the Criminal History Systems Board.

The sample document entitled "Application for a Firearm Identification Card" is in my opinion, a public record. The applicant must sign a statement asserting that he or she is not disqualified for listed reasons which include felony convictions, confinement for mental illness, and drug or alcohol related violations, confinement or treatment. However, the only information

appearing on this document is the applicant's disclaimer. So long as the application contains no substantive information concerning the applicant's prior convictions, confinement, or drug or alcohol problems, I consider it to be a public record.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 43 November 10, 1975

James P. Whitters, III, Esquire
Chairman, Outdoor Advertising Division
80 Boylston Street
Boston, Massachusets 02116

Dear Sir:

You have asked my opinion on the following questions:

> "1) Are signs on taxicabs which are not registered as common carriers with the Department of Public Utilities exempt from the [Outdoor Advertising] Board's regulations pursuant to General Laws, Chapter 93, Section 32?"
>
> "2) Does G. L. c. 93, § 32 exempt such signs from the provisions of G. L. c. 93D?"

For reasons developed more fully below, I answer both questions in the negative. Signs on taxicabs are not exempt from regulation by the Outdoor Advertising Board (Board) by virtue of G. L. c. 93, § 32.

The duties and responsibilities of the Board, as well as practice before the Board, are set out in part in G. L. c. 93, §§ 29 *et seq.* The section which you have cited for my consideration, section 32 of Chapter 93, exempts certain structures from regulation by the Board. Specifically, it provides:

> "Sections twenty-nine to thirty-one, inclusive, and section thirty-three shall not apply to signs or other devices on or in the rolling stock of any common carrier, nor shall said sections apply to signs or other devices on or in stations, subways or structures of or used by any common carrier unless such signs or devices are displayed within view of a public way."

For advertising devices on taxicabs to fall within the exceptions carved out by section 32, two conditions must be met. First, the taxicabs in question must be "rolling stock" and second, they must be operated by "common carriers". I am of the opinion that taxicabs do not meet the dual test necessary for exemption because they are not "rolling stock."

Words and phrases in a statute are ordinarily construed according to the common and approved usage of the language. Where, however, a technical term is used in a statute, the technical meaning of the phrase is controlling. See *Corcoran* v. *S. S. Kresge Co.*, 313 Mass. 299 (1943). The phrase "rolling stock" is a term of art. In construing that phrase it must be supposed that the Legislature took into account the subject matter involved and used the phrase in its technical sense. Rolling stock, therefore, must be read to mean

"the moving stock and fixtures attached thereto belonging to railroads and street railways." Black's Law Dictionary.

The Supreme Judicial Court has specifically accepted this narrow definition of the term, and has noted that section 32 excepts some advertisements "on or in railroad property." *General Outdoor Advertising Company* v. *Department of Public Works,* 289 Mass. 149, 162 (1935). Since taxicabs are not railroad property they are not rolling stock and, therefore, not excepted by section 32.

A common carrier is one who holds himself out to the public as willing to indiscriminately furnish transportation of goods or persons for a fee. *First National Stores, Inc.* v. *H. P. Welch, Co.,* 316 Mass. 147, 149 (1944). For purposes of tort liability, taxicabs have been held to be common carriers. See *Finnegan* v. *Checker Taxi Company,* 300 Mass. 62 (1938). Nevertheless, since taxicabs do not meet the first standard of section 32, it is not necessary for me to determine whether the second criterion is met. I, therefore, decline to determine whether or not taxicabs are common carriers within the meaning of section 32.

My conclusion that section 32 does not exempt taxicabs from the provisions of Chapters 93 and 93D should not be interpreted as a statement that those vehicles must in fact be regulated by the Board. Chapter 93, § 29 vests in the Board a discretionary power to regulate advertising devices. While I am of the opinion that the Board can regulate taxicab advertising, I express no opinion on the wisdom of such regulation. The decision to regulate is one statutorily committed to the Board, not the Attorney General.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 44 November 13, 1975

Charles V. Barry
Secretary of Public Safety
905 Commonwealth Avenue
Boston, Massachusetts 02215

Dear Secretary Barry:

You have requested my opinion on the authority of the Board of Appeal on Motor Vehicle Liability Policies and Bonds (hereafter referred to as the Board) created by G.L. c.26, § 8, to annul a decision of the Registrar who suspended an individual's license pursuant to G.L. c.90, § 24. You have attached a letter from Robert A. Panora, Registrar of Motor Vehicles, which outlines the following facts:

> On January 18, 1975 the person in question was arrested for operating a motor vehicle while under the influence of intoxicating liquor, G.L. c.90, § 24, and driving the wrong way on a one way street, G.L. c.20, § 79. On January 23, 1975, the defendant submitted to a finding of guilty on the first charge. However, the case was "continued" to January 23, 1976, and the defendant was to attend the Driver's Program conducted by the Dis-

trict Court of Springfield. In addition, the defendant submitted to a finding of guilty on the second charge. She surrendered her license to the Probation Office for three months. After receipt of the court abstract, the Registrar notified the defendant that her license was revoked effective May 23, 1975.

The defendant appealed to the Board which, after a hearing, annuled the decision of the Registrar for the following reasons:

> (1) To the charge of Operating Under the Influence, the Appellant submitted to a finding of sufficient facts that would support a finding of guilty, after which the case was continued without a finding.
>
> (2) That the appellant has successfully completed the Driving while Drinking Course conducted by the Springfield District Court.

G.L. c.90, §24 (b) provides for immediate suspension of a license upon conviction of driving under the influence of intoxicating liquor. Obviously, a prerequisite to any action by the Registrar is a conviction in the district or municipal court. An underlying legal question is presented here as to whether submission to a finding of guilty is synonymous to a conviction. That question need not, however, be addressed in this opinion. Rather, the threshold and dispositive question is the relationship of the Board to the Registrar.

Any ruling or decision of the Registrar may be appealed to the Board, which in turn may "order such ruling or decision to be affirmed, modified or annulled" G.L. c.90, § 28. The authority of the Board to review and act upon a decision of the Registrar is not limited by the discretionary or mandatory nature of the Registrar's decision. *Ullian* v. *Registrar of Motor Vehicles,* 325 Mass. 197 (1950); 1964 Op. Atty. Gen. 151. In the recent case of *Boyle* v. *Registrar of Motor Vehicles,* 1975 Mass. Adv. Sh. 1998, 2001, the Supreme Judicial Court clearly held that even where the Registrar is given no discretion and must revoke a license pursuant to G.L. c.90, § 24(1) (b) upon notification of a conviction for driving under the influence, the Registrar's decision is subject to appeal to the Board under G.L. c.90, § 28 and to judicial review under G.L. c.30A, § 14. To the extent that *Love* v. *Lucey,* Suffolk Superior No. 683118 (August 27, 1974) and 1963 Op. Atty. Gen. 77 hold to the contrary, and limit the Board's review authority to "discretionary" decisions of the Registrar, they are overruled.

Should the Board decide to annul the decision of the Registrar, as in this case, the only option for the Registrar, beyond returning the license, is to seek judicial review of the Board's decision pursuant to G.L. c.30A, § 14. *Boyle, supra* at 2001. Unless the Board or the court orders otherwise (see G.L. c.30A, § 14(3)) the decision and order of the Board has full force and effect and must be complied with. It should be unnecessary for the board to resort to its powers under G.L. c.90, § 28 by applying to the court for assistance in enforcing its orders against another state agency over which it has the power of review.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 45 November 14, 1975

Russell E. O'Connell
Commissioner
Massachusetts Rehabilitation Commission
296 Boylston Street
Boston, Massachusetts 02116

Dear Commissioner O'Connell:

You have requested my opinion on the following two questions:

(1) Whether the term "information" in G.L.c. 6, §8 refers to the actual record of an applicant for vocational rehabilitation, or refers only to an edited summary of the contents of that record; and

(2) Whether the Massachusetts Rehabilitation Commission is empowered by G.L.c. 6, §§75 and 84 to promulgate rules and regulations indicating the degree of access of individuals and of other persons and state agencies to the records or to an edited summary.

I conclude that edited summaries rather than complete records may be provided to applicants and Departments, divisions or subdivisions of the Commonwealth and that the Commissioner of Rehabilitation may promulgate regulations describing the extent of this access. My reasons are as follows.

(1) General Laws, Chapter 6, section 84 makes a distinction between a data subject's full record and "information concerning his own record." The statute reads as follows:

> Information or records concerning any applicant for vocational rehabilitation shall be confidential and for the exclusive use and information of the commission in the discharge of its duties. *Such information or records* shall not be open to the public, notwithstanding the provisions of section ten of chapter sixty-six or other provisions of law, and shall not be admissible in any action or proceeding unless the commission is party to such action or proceeding; provided, however, that said applicant, or, with his written authority, his attorney, shall be supplied by the commission with *information concerning his own record* which is necessary to him in his relations with the commission; and provided, further, that the Commission may, in accordance with rules and regulations, on request provide *such information* to any person or department, division or sub-division of the Commonwealth directly concerned in the vocational rehabilitation of said applicant or to a party to an agreement established under the provisions of section eighty-one. *(Emphasis Added)*

The statute by use of the phrase "information concerning his record" plainly indicates that less than an entire record can be provided upon request. See 1963-64 Op. Atty. Gen. It is a traditional principle of statutory construction that a statute is to be interpreted so as to give meaning to all of its language. *Town Crier, Inc.* v. *Chief of Police of Weston,* 1972 Adv. Sh. 891, 282 N.E. 2d 379. Throughout G.L.c. 6, section 84, the terms "information" and "records" are used interchangeably until, in the phrase having to do

with access by the date subject, "information" is used to mean a part of the record. Thereafter, the statute refers back to "such information" in two places. There is no ambiguity in the statute and it must be interpreted according to the usual and common meanings of the words therein. *Commonwealth* v. *Thomas,* 359 Mass. 386, 269 N.E. 2d 277 (1971). Thus, as to requests by applicants, the Commissioner of Rehabilitation may provide edited summaries, if these summaries will provide an applicant with all the information which is necessary to him in his relations to the Commission. This does not mean, as worded in the opinion request that the term "information" refers only to an edited summary of the records. If an edited summary is not sufficient to apprise an applicant of all the information which is necessary to him in his relations to the Commission, those parts of the record necessary to properly inform the applicant must be provided.

As to request for information from any person or department, division or subdivision of the Commonwealth directly concerned in the vocational rehabilitation of the specific person, the provision of this information is left within the discretion of the Commission of Rehabilitation.

(2) In response to question two, the Commissioner of Rehabilitation has broad authority to issue regulations concerning vocational rehabilitation of individuals:

> The Commissioner shall, with the approval of the Governor and council, prescribe all rules and regulations relating to the vocational rehabilitation of handicapped persons . . . . G.L.c. 6., § 75.

It is my opinion that this broad power to issue regulations includes the power to set standards concerning access to information by data subjects. A data subject's access to "information concerning his own record which is necessary to him in his relations with the Commission" may well bear upon his ability to receive necessary vocational rehabilitation. G.L.c. 6, section 84. In addition, G.L.c. 6, section 84 authorizes the Commissioner to issue rules and regulations concerning the dissemination of information to persons or departments, divisions or subdivisions of the Commonwealth. Also, pursuant to this power granted under G.L.c. 6, section 84, rules and regulations could be promulgated concerning the providing of edited summaries of records.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 46 November 24, 1975

Honorable Gregory R. Anrig
Commissioner of Education
182 Tremont Street
Boston, Massachusetts 02111

Dear Commissioner Anrig:

You have asked my opinion concerning the applicability of the Governor's Executive Order No. 116 to school construction grants administered by the School Building Assistance Bureau which is part of the Department of Education. I find that Executive Order No. 116 does apply to the activities of this Bureau, and that the Bureau, pursuant to the requirements of that Executive Order, may require contractual assurance of compliance with nondiscrimination laws.

As you noted in your request for an opinion, my predecessor previously considered the applicability of Executive Order No. 74 to the activities of the School Building Assistance Bureau. He concluded that the Executive Order did not apply because it was not intended to regulate contracts between local school committees and contractors, (Op. Atty. Gen. 1973-74, No. 22 (Nov. 20, 1973) p. 2); and, that the Department's control over the disbursement of funds through the School Building Assistance Bureau was not sufficient "state action" with respect to school construction contracts to subject those contracts to the provisions of Executive Order No. 74. *Id.* at p. 4.

That situation has been changed, however, by the promulgation of Executive Order No. 116, which amends and supersedes Executive Order No. 74. Unlike Executive Order No. 74, Executive Order No. 116 requires in Article IV the inclusion of clauses assuring compliance with nondiscrimination requirements in "every *state-assisted* contract for public buildings and public works," as well as state contracts for public works. (Emphsis supplied.)

The role of the School Building Assistance Bureau is one of providing state assistance to the cities and towns for the purpose of construction of public schools. Even though the actual construction and maintenance of a schoolhouse is a matter under local jurisdiction (Op. Atty. Gen., 1973-74, No. 22 (Nov. 20, 1973), at p. 2), the School Building Assistance Bureau causes monies to be provided to the local school committees to finance construction, as part of its statutorily defined responsibilities. See, *e.g.,* Appendix to G. L. c. 70, §§ 1-8 and 1-9.*

Because the Bureau is part of a state agency, it is subject to the mandates of an Executive Order of the Governor. Op. Atty. Gen., 1973-74, No. 22 (Nov. 20, 1973). Any contract for the construction of a public school which is assisted by state funds must, therefore, contain a nondiscrimination clause. Assistance includes provision of state funds to underwrite all or part of the construction and other technical advice which enables the locality to arrange for construction. A requirement for nondiscrimination in state assisted school construction projects is as valid as a requirement for such a clause in projects supported by federal funds (see *e.g., Associated General Contractors*

*In fiscal 1975, the School Building Assistance Bureau authorized grants of over $111 million to be made to cities and towns for new construction or renovation of existing school facilities.

of Massachusetts v. *Altshuler,* 361 F. Supp. 1293 (D. Mass. 1973)), and I believe, therefore, that Executive Order No. 116 applies to the work of the School Building Assistance Bureau.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 47 December 15, 1975

Honorable Robert Q. Crane
Treasurer and Receiver General
Treasury Department
State House
Boston, Massachusetts 02133

Dear Mr. Treasurer:

By letter of December 9, 1975 (a copy of which is attached as Appendix A), you have asked several questions regarding the legality of the application of MBTA assessment proceeds to the payment of notes issued by the Commonwealth under G.L. c. 161A, § 12.

These questions lack answers from direct and authoritative precedent. I address them in turn.

(1) Is it lawful and constitutional to apply MBTA assessment proceeds in payment of notes issued by the Commonwealth under G.L. c. 161A, § 12 without appropriation of such proceeds? (See *Opinion of the Justices,* 309 Mass. 609; *Singleton* v. *Treasurer & Receiver General,* 340 Mass. 646, 649-651.)

From the decisions available, I believe so. In *MBTA* v. *Boston Safety Deposit & Trust Co.,* 348 Mass. 538, 554 (1965), the Supreme Judicial Court observes that "the [respondent] banks do not contend that borrowings under [G.L. c. 161A] § 12 are not within the authority of art. 62, § 2 [of the Amendments to the Constitution of the Commonwealth]." The Court does not press the issue upon its own initiative. Its acquiescence in the omission of the issue is an indication that the constitutional contention would not be meritorious. In addition, the tenor of the Court's discussion in *Singleton* v. *Treasurer & Receiver General,* 340 Mass. 646 (1960), also supports the practice by which the Commonwealth issues notes in anticipation of assessment proceeds and repays the notes with the same proceeds.

(2) If and to the extent that such assessment proceeds (together with available state contract assistance) are insufficient to pay such notes when due, is it lawful and constitutional to use other funds for this purpose without appropriation?

The questions is a close one of constitutional construction. Amendments, art. 62, § 2 provides that "the Commonwealth may borrow money . . . in anticipation of receipts from taxes or other sources, *such loan to be paid out of the revenue of the year in which it is created.*" We must ask what "revenue" is meant.

If it is the revenue anticipated by the borrowing, the application of funds from the general treasury might be unconstitutional. If it means revenue from all sources, no constitutional problem arises. According to the usual canons, I favor the reasonable statutory construction avoiding both unconstitutionality and constitutional doubt. See, *e.g., Chipman* v. *MBTA,* 1974 Mass. Adv. Sh. 1447, 1453; *Commonwealth* v. *Lamb,* 1974 Mass Adv. Sh. 713, 717-718; and *Board of Appeals of Hanover* v. *Housing Appeals Committee in the Department of Community Affiars,* 1973 Mass. Adv. Sh. 491, 512. I read "revenues" to refer to all sources and I conclude in favor of the constitutionality of the practice in question.

As for the lawfulness of the practice under the statutes, G.L. c. 29, § 18 provides that:

> [e]xcept as otherwise provided, no money shall be paid by the commonwealth without a warrant from the governor drawn in accordance with an appropriation then in effect, and after the demand or account to be paid has been certified by the comptroller; *provided that the principal and interest on all public debts shall be paid when due without any warrant and that no appropriation shall be required for the payment . . . of treasury notes issued for duly authorized temporary loans . . .* (Emphasis supplied.)

I interpret the emphasized language to authorize payment without a warrant and without an appropriation.

(3) If assessment proceeds or other moneys may lawfully and constitutionally be applied to the payment of the notes without appropriation, would the power to do so be terminated in the event the noteholder obtained a judgment against the Commonwealth under Chapter 258 of the General Laws? (See Section 3 thereof)

G.L. c. 258, § 3 provides in pertinent part that "the state treasurer . . . shall pay the [final judgment or decree] from any *appropriations* made for the purpose [of such payment] by the general court." (Emphasis supplied.)

The answer to this question requires a reconciliation of G.L. c. 258, § 3 with G.L. c. 29, § 18, also quoted above. In effect G.L. c. 29, § 18 authorizes the payment of treasury notes without appropriation, while G.L. c. 258, § 3 would require an appropriation for a treasury note obligation reduced to a judgment. We must resolve this apparent inconsistency. No helpful decision lies directly in point.

Whenever two or more statutes relate to the same subject matter, they should be construed harmoniously toward a consistent legislative purpose. *Board of Education* v. *Assessors of Worcester,* 1975 Mass. Adv. Sh. 2626, 2629-2630 (cases collected). See Sands, Sutherland Statutory Construction, § 51.01 (4th ed. 1973). In this instance, I conclude that the consistent and dominant legislative purpose would free the payment of an acknowledged treasury note obligation, in judgment form or not, from the requirement of a specific appropriation.

Two considerations in particular lead me to that conclusion. First, G.L. c. 29, § 18 addresses substantive fiscal policy, while G.L. c. 258, § 3 deals

merely with the procedural mechanics of payment pursuant to a Superior Court judgment. Second, G.L. c. 29, § 18 deals specifically with discrete and enumerated classes of payments purposefully excepted from the appropriation requirement; while G.L. c.258, § 3 deals generally and indiscriminately with judgment obligations. In short, § 18 suggests a substantive exception to a procedural generality. In this light, I regard the policy of G.L. c. 29, § 18 as overriding. Once settled, by some acknowledgement or judgment, a treasury note obligation seems meant to be honored without the necessity of specific appropriation. The mere *form* of obligation as a final judgment does not seem intended to alter this statutory policy.

CONCLUSION

For the foregoing reasons, I answer the questions in your letter of December 9, 1975, "yes," "yes," and "no," respectively.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 48 December 24, 1975

Honorable John G. Buckley
Secretary
Executive Office of Administration and Finance
Room 312, State House
Boston, Massachusetts

Dear Secretary Buckley:

You have asked my opinion concerning the following question:

> Whether individuals who are not members of the Bar of the Commonwealth of Massachusetts may be permitted to act in a *representative* capacity at adjudicatory hearings held by the Division of Hearing Officers where the legal rights, duties and privileges of named parties are determined in accordance with procedures established and required under M.G.L., c.30A.

My answer to your specific question is that no rule of law prohibits persons who are not members of the bar from appearing before the Division of Hearing Officers as representatives of parties to adjudicatory hearings held pursuant to G.L. c.30A, § 14, provided that appropriate rules (as later explained) are first adopted to permit appearances by non-lawyers. Unless and until such rules are adopted, only members of the bar may so appear. I base this answer upon a careful review of the decisions of the Supreme Judicial Court, the law of other jurisdictions, and a consideration of constitutional requirements. Because of the general importance of the issues involved in your question, I offer the following additional advice.

It is my opinion that determination of the qualifications for practice before the Division of Hearing Officers is a subject for agency decision through its rule-making process. G.L. c.7, § 4H delegates to the chief hearing

officer the responsibility to "organize his division to provide speedy and fair disposition of all appeals and to establish policies that will encourage and aid parties in limiting and consolidating issues and pleadings to the superior court." The Division is given further responsibility pursuant to G.L. c.30A, §§ 9 and 10 to adopt regulations governing its conduct of adjudicatory proceedings and to afford all parties to such proceedings "an opportunity for full and fair hearing." Implicit in these statutory grants of power to prescribe rules of practice and procedure is the authority to prescribe rules governing the admission of persons to practice before the Division. *See Goldsmith v. U.S. Board of Tax Appeals,* 270 U.S. 117 (1925) (Board of Tax Appeals authorized to promulgate rules for admission to practice by general statutory delegation of power to prescribe rules of practice and procedure).

The Supreme Judicial Court has never specifically determined the limits of agency rulemaking power in this area. However, in *Lowell Bar Association v. Loeb,* 315 Mass. 176, 52 N.E.2d 27 (1943), the Court declined to overturn a rule permitting accountants to appear before the Appellate Tax Board and more recently has promulgated a rule concerning practice by law students before administrative agencies. The recently promulgated Supreme Judicial Court Rule 3:11(7) states that law students qualified under the rule may appear "before any administrative agency, provided such appearance is not inconsistent with its rules." This language suggests that the Court shares the federal view that administrative agencies are generally authorized to determine the qualifications of persons permitted to practice before them. *See generally, Sperry v. Florida,* 373 U.S. 379 (1963) (federal agencies may determine qualifications of persons who practice before them).

Since the Division has the authority to determine qualifications for practice, it is important to review the principles which should guide its rulemaking proceedings. Rules of practice should be reasonable and within the ambit of the statutory standards requiring the "speedy and fair" disposition of appeals and encouraging the refinement of issues for judicial review. *Commonwealth v. Diaz,* 326 Mass. 525 (1950). Of course, rules must be promulgated in accordance with procedures for notice and an opportunity to be heard provided by G.L. c.30A. The specific content of the rules should be determined on the basis of a careful consideration of the factual and policy issues which arise in the course of rulemaking proceedings, and the determinations should reflect the sound exercise of agency discretion. In exercising agency discretion, I suggest that the Division give careful attention to the nature of a Rate Setting Commission adjudicatory appeals proceeding and the specific functions which representatives must perform in order to prosecute appeals from Commission determinations in a prompt and competent manner. If the Division desires to permit non-lawyers to appear before it, however, protection of the public interest requires that it promulgate rules governing the qualifications of persons permitted to practice before it, using, perhaps, the standards of the United States Internal Revenue Service or similar agencies as models. In this regard, I would like to call your attention to two lines of cases which set outer boundaries on the exercise of agency discretion to determine the qualifications of persons appearing as representatives in administrative proceedings.

One boundary is defined, rather indistinctly, by the traditional strictures prohibiting the unauthorized practice of law. *See, e.g.* G.L. c.221, § 46A. Because the Supreme Judicial Court is the final arbiter of the question whether conduct constitutes the "practice of law", *Lowell Bar Association, supra* at 180, 52 N.E.2d at 31, it would presumably assess challenged regulations independently of an agency's rulemaking determinations. Its views on this question are, therefore, important to bear in mind.

The Court has stated that the term "practice of law" is not susceptible of precise definition and that its applicability to specific conduct depends upon factual determinations which can only be made on a case by case basis. *In the Matter of the Shoe Manufacturers Protective Association, Inc.,* 295 Mass. 369, 3 N.E.2d 748 (1936); *see, Lowell Bar Association* v. *Loeb, supra* at 180, 52 N.E.2d at 31. In *Lowell Bar Association,* an action to restrain the unauthorized practice of law by persons engaged in the preparation of income tax returns, the Court stated that:

> [t]he proposition cannot be maintained that whenever, for compensation, one person gives to another advice that involves some element of law, or performs for another some service that requires some knowledge of law, or drafts for another some document that has legal effect, he is practising law. All these things are done in the usual course of the work of occupations that are universally recognized as distinct from the practice of law. *Id.* at 181, 52 N.E.2d at 31.

Recognizing the existence of penumbras of activity surrounding occupations like accountancy and architecture which involve the use of legal knowledge and skills, the Court adopted a negative test to delimit the boundary of unauthorized practice:

> . . . any service that lies wholly within the practice of law cannot lawfully be performed by an accountant or any other person not a member of the bar. *Id.* at 183, 52 N.E.2d32.

The Court then found itself on "debatable ground" when it applied this test to income tax preparation, activity admittedly outside the familiar territory of courtroom advocacy and traditional legal advice and clearly within the penumbra of accountancy. After carefully examining the activities of the tax preparer defendants, it concluded that the preparation of income tax returns does not lie "wholly within the field of the practice of law" and therefore might be performed by persons who are not members of the bar. *Id.* at 186, 52 N.E.2d at 34.

The Court's method in *Lowell Bar Association* is instructive. The opinion follows the rule of *Shoe Manufacturers Association, supra,* and bases its conclusion upon a functional analysis of the case's specific facts. It also relies upon a negative test which requires not simply similarity or shared function but rather congruence between the conduct under scrutiny and well-accepted exclusively lawyer functions. I suggest that the Division of Hearing Officers, in the absence of clearer guidance from the Court, undertake a similar approach to developing practice rules.

The other boundary, unfortunately also rather uncertain, is set by the Constitution of the United States, and a rule which is unduly restrictive may conflict with constitutional requirements.* The U.S. Supreme Court has indicated that this boundary includes, as a matter of procedural due process, the right to meaningful access to legal proceedings and has invalidated regulations which were found to be so restrictive as to amount to denials of access. *See, e.g., Johnson v. Avery,* 393 U.S. 483 (1969) (prison regulations cannot prohibit inmates from assisting others in drafting habeas corpus petitions). The right to a meaningful hearing was applied to administrative agencies in *Goldberg v. Kelly,* 387 U.S. 254 (1970) (right to fair hearing before termination of welfare benefits) and *Perry v. Sindermann,* 408 U.S. 593 (1972) (right to hearing before termination of employment by a state university). While it is not clear how far this due process principle extends and to what kinds of proceedings it applies, the cases cited represent a constitutional requirement which an agency must carefully respect in formulating practice rules.

The Supreme Court has articulated another aspect of the constitutional boundary on agency discretion in a line of cases holding the First Amendment to protect certain forms of "collective activity undertaken to obtain meaningful access to the courts." The latest case in this series is *United Transportation Union v. State Bar of Michigan,* 401 U.S. 576 (1971), in which the Court upheld a union plan for referring members to selected attorneys for representation under the Federal Employers Liability Act. This principle has also been applied in the context of administrative agencies, e.g., *United Mineworkers of America v. Illinois State Bar Association,* 389 U.S. 217 (1968) (union staff attorneys may represent union members under state workmen's compensation act). Although these cases thus far have involved referral or retention of attorneys at law by organizations, it is possible that other forms of collective activity may also be protected.

Finally, the Court's very recent decision in *Goldfarb v. Virginia State Bar,* — U.S. —, 44 L.Ed. 572 (1975) may represent an additional component of the boundary limiting restrictive agency practice rules. *Goldfarb* applied federal antitrust law to rules of the Virginia State Bar mandating minimum fee schedules. The Court's opinion strongly suggests that state regulations which restrain trade in favor of the legal profession's economic interests may be held to violate federal law. In light of this possibility, the Division of Hearing Officers should be careful to establish a substantial basis in the record of its rulemaking proceedings to justify any restrictions it decides to impose upon practice by non-lawyers.

In summary, it is my opinion that the Division of Hearing Officers has the authority to promulgate rules specifying qualifications for persons who appear before it as representatives in adjudicatory proceedings. In promulgating its rules, the Division should be certain that they are soundly based upon statutory standards, are in furtherance of the effective operation of the

*Primarily because of the recent constitutional developments discussed below, I consider the opinion of a prior Attorney General dealing with these issues no longer an accurate statement of the law and decline to follow it. The opinion in question was provided to the Chairman of the Department of Public Utilities and may be found at 1947 Op. Atty. Gen. 81.

Division, and are made with due regard for the principles and case law outlined above. Agency action which adheres to these guidelines in my opinion is within the bounds of administrative discretion as currently defined.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 49 December 24, 1975
Charles V. Barry
Secretary of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts

Dear Secretary Barry:

You have asked me whether or not a member of the uniformed branch of the state police is to be credited, for purposes of promotion to the rank of captain, with longevity points for service in the division of state police other than that spent in the uniformed branch. Specifically, you have requested my opinion as to the proper interpretation of the word "service" in G.L. c.22, §9-0(3).

You have indicated that the practice of the Department has been to include only years of service in the uniformed branch when computing longevity, but that the practice is currently being challenged by an officer who relies on a 1966 Opinion by former Attorney General Brooke for the proposition that "service" means "all service, including that as a civilian employee." 1966 Op. Atty. Gen. 297.[1] I am of the opinion that your previous practice of not granting longevity points for years spent as a civilian employee is consistent with G.L. c.22, §9-0(3).

The provisions of law you ask me to interpret were inserted by Chapter 785 of the Acts of 1965. Shortly after that statute took effect, the then Commissioner of Public Safety asked the Attorney General whether or not the word "service" included time spent as a trainee at the state police academy. The Attorney General wrote:

> By making 'longevity' a factor in the promotion system for members of the state police, the Legislature intended that promotions should to some extent depend on the amount of knowledge and practical experience which a man may have gained in the course of performing his duties as a state police officer. . . . 1966 Op. Atty. Gen., 386, 390.

The opinion went on to suggest that the Commissioner himself resolve the question by adopting an administrative interpretation, citing *Cleary* v. *Cardullo's, Inc.*, 347 Mass. 337 (1964). It appears from your opinion request that

[1]Reliance on this Opinion is misplaced. The phrase interpreted in that instance was "service in said division of state police" not "service" and the involved statute, G.L. c.32, §28A, dealt with retirement, not promotions. The purpose of G.L. c.32, §28A is different from the purpose of G.L. c.22, §9-0(3).

the Department has resolved the question and has implemented the statute in a manner consistent with the legislative purpose. That administrative interpretation is entitled to great weight, *Devlin* v. *Commissioner of Corrections,* 1973 Mass. Adv. Sh. 1601; *Town Crier, Inc.* v. *Chief of Police of Weston,* 361 Mass. 682 (1972), and is, in my opinion, a permissible construction of subsection 3 of section 9-0 of General Laws, Chapter 22. I, therefore, conclude that you may continue to deny longevity points for service as a civilian employee.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 50 December 29, 1975

Ms. Amelia L. Miclette, Chairman
Civil Service Commission
John W. McCormack Building
1 Ashburton Place
Boston, Massachusetts 02108

Dear Ms. Miclette:

You have requested my opinion as to whether G.L. c.30, §9A is to be interpreted as granting rights under c.31, §§43 and 45 only to veterans who have served in a permanent position for three years. You state that the basis for this inquiry is an apparent contradiction in the statutory scheme linking c.30, §9A with c.31, §§43 and 45.

The language of §9A makes no distinction between temporary and permanent positions, only requiring three years of service in an office or position. It provides that veterans who qualify are entitled to the protections of c.31, §§43 and 45 to the same extent as if their "office or position were classified under" chapter 31. Sections 43 and 45, however, apply only to persons in permanent positions. The conflict arises when a veteran serves three years in a temporary position. To give such a veteran the benefits of c.31, §§43 and 45 is arguably to freeze the temporary position, at least for the duration of the veteran's employment.

It is not necessary to reach the question you pose, however, since the case which prompted your request does not present such a problem. You have provided to me a copy of the hearing examiner's report in a matter involving a veteran who claims to have qualified under G.L. c.30, §9A. It appears that the veteran originally held his position under a temporary appointment. Subsequently, the position was given permanent status and the veteran became a permanent employee. The veteran has apparently held the position for over three years. The hearing officer found that the veteran's temporary and permanent positions were the same, noting the identical titles and payroll code numbers. There is no court opinion which distinguishes between temporary and permanent positions, except to the extent that service in such positions will not be tacked on for tenure purposes if the

temporary and permanent positions are not the same. See, *Chairman of the State Housing Board* v. *Civil Service Commission,* 332 Mass. 241 (1955). Also see 1960-61 Op. Atty. Gen. 96; 1965-66 Op. Atty. Gen. 216. Therefore, on the basis of the hearing officer's finding, I conclude that the veteran has served three or more years in the same position.

Furthermore, it appears that the position in which the veteran currently serves is a permanent position. Thus, where a veteran has served for three years or more in the same position, and where the position in which he or she serves is, at the end of three years, classified as a permanent position, it is my opinion that the veteran qualifies under c.30, §9A and must be afforded the protections set forth in G.L. c.31, §§43 and 45. I do not, however, express an opinion as to whether a veteran would qualify under c.30, §9A if, after three years service, the veteran serves in a temporary as opposed to a permanent position.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 51 January 5, 1976
John J. Carroll, Commissioner
Department of Public Works
100 Nashua Street
Boston, Massachusetts 02114

Dear Commissoner Carroll:

You have requested my opinion on a question of law arising under general principles of the law of eminent domain and the provisions of Chapter 803 of the Acts of 1960 [The Act]. Under the terms of the Act the Commonwealth relinquished rights in certain premises in the cities of Boston and Cambridge to the Boston Sand and Gravel Company [The Company]. The Company currently maintains a plant on those premises. Your specific question is whether the Commonwealth will incur legal liabilities if the Massachusetts Department of Public Works fails to grant the Company two means of access to those facilities over land within the control of the Department. I answer your question in the affirmative. My reasoning and the facts upon which I base my opinion are laid out below.

The question you have posed is essentially one of statutory construction. My task in such cases is to ascertain and implement the intent of the legislature. The main source for the ascertainment of legislative policy are the words of the statute itself, but under appropriate circumstances one may properly look as well to contemporary customs and conditions and the history of the times. *Commonwealth* v. *Rivkin,* 329 Mass. 586 (1953); *Commonwealth* v. *Welosky,* 276 Mass. 398, 401 (1931). Both the words of Chapter 803 and the conditions surrounding its passage support my opinion.

Under the terms of the Act and for consideration paid into the Treasury of the Commonwealth, the General Court released all rights, title and interest

possessed by the Commonwealth in two parcels of land which previously had been conveyed to the Company by the Boston and Maine Railroad Company. The Act also specifically released all rights, title and interest to the easements granted in the deeds duly recording that conveyance. There were four such easements granted to the Company by the B&M Railroad and it is my opinion that the Act contemplated the maintenance of those easements.[1] Such a conclusion is mandated by the express reference to the easements in the statute and survives in spite of the rule that statutes relating to grants by the public authority to private individuals must be strictly construed against the grantee. *Tilton* v. *City of Haverhill,* 311 Mass. 572 (1942).

It is also clear that in promulgating Chapter 803 the General Court anticipated the fact that an elevated highway would be constructed on the involved premises and that provisions would necessarily have to be made for passage under that highway. The last paragraph of the Act provides:

> "The act of the company in making [the required] payment to the treasurer shall constitute a covenant with the commonwealth binding upon the company and all persons claiming under it that no damages will be claimed from the commonwealth by reason of any taking for an elevated highway of the premises shown on the Department of Public Works plan entitled 'Exhibit IB20, Interstate Route 695, Sheet 19,' or any taking in substantially the same form as shown on said plan, no matter how the plan or plans are designated; *provided, that the taking is made in such a manner as to permit the company's concrete mixer trucks to pass and repass under said elevated highway."* (emphasis added).

Thus, the intent of the legislature which passed Chapter 803 was to continue to permit the Company to use the easements it acquired from the B&M and to pass and repass under any elevated highway ultimately constructed.

In your request you indicate that the original access routes are not currently available to the Company. The unavailability of these routes is due in part to the relocation of B&M tracks, in part to takings by the Department for highway construction, and in part to subsequent takings from the Metropolitan District Commission's new Charles River Dam. It is my opinion that the Department can only comply with the proviso of the last paragraph of the Act if it grants new access routes to the Company to replace the routes no longer available to them. The statute does not require that such access routes be granted, but if they are not, the covenant in the last paragraph of the Act is breached and the Commonwealth may be liable for damages.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

[1]Two of the easements are not relevant to this opinion. One permits the Company to pass freely between the two parcels over a strip of land owned by the B&M, while the second permits the use of Mill Creek by boat.

Number 52 January 8, 1976
Honorable John R. Buckley
Secretary of Administration and Finance
State House
Boston, Masschusetts 02133

Dear Secretary Buckley:

You have requested my opinion concerning the application of Rule LV-8[1] of the Rules and Regulations Governing Vacation Leave to a state employee who had his vacation credits held in escrow during a leave of absence and who, upon return to his former position, was subsequently retired.

Rule LV-5 allows vacation credits earned but not used in one vacation year to be carried over for a maximum of two additional years; they must during that period be used or forfeited. A prior Attorney General opinion construed Rule LV-5 to allow an employee taking a leave of absence to hold in escrow all vacation credits earned until his return to employment. 1962 Op. Atty. Gen. 153-154. The question you present, then, is whether the result should be different because the employee retired, rather than resumed employment.

Upon retirement, Rule LV-8 only provides for payment of "an amount equal to the vacation *allowance* as *earned* in the vacation year prior to . . . retirement which had not been granted and . . . that portion of the vacation *allowance earned* in the vacation year during which . . . retirement . . . occurred." (Emphasis supplied.) A vacation allowance is defined in Rule G-7 as "Vacation credits earned during any vacation year."

The use of the terms "vacation allowance" and "earned" in Rule LV-8 makes clear that a state employee subject ot Rule LV-8 who has not taken a leave of absence is entitled to payment for the unused vacation credits earned in the year prior to retirement and unused credits earned during the year of requirement, but is not entitled to unused credits earned two vacation years earlier and carried over under the provisions of Rule LV-5.

A state employee who has taken a leave of absence in which he held a state job exempt from the vacation rules has, nevertheless, served the Commonwealth without interruption and is entitled to the same rights under Rule LV-8 as other employees with uninterrupted service.

To give Rule LV-8 the same effect on returning employees as all other employees, the years of exempt employment are to be excluded from consideration.

Hence, it is my opinion that under Rule LV-8 an employee who retires within the vacation year during which he returned is entitled to payment for the unused vacation credits earned in the year of retirement and the unused vacation credits held in escrow from the year prior to retirement, which is

[1]Rule LV-8 tracks the language of M.G.L. c.29, §31A, which statute reads, in part: Employees who are eligible for vacation under the rules of said personnel administrator and whose services are terminated by dismissal through no fault or delinquency of their own, or by retirement, shall be paid an amount equal to the vacation allowance as earned in the vacation year prior to such dismissal or retirement which had not been granted, and, in addition, that portion of the vacation allowance earned in the vacation year during which such dismissal or retirement occurred, up to the time of separation; provided, that no monetary or other allowance has already been made therefor.

construed as the vacation year during which the employee took the leave of absence. As in the case of all other employees, no payments are made for vacation credits carried over an additional year under the provisions of Rule LV-5 even though they were held in escrow during the employee's absence. They are available for use as vacation days prior to retirement, but not for payment in lieu of vacation.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 53 February 9, 1976
Honorable Robert L. Okin
Commissioner of Mental Health
190 Portland Street
Boston, Massachusetts 02114

Dear Commissioner Okin:

You have requested my opinion on the following issues:

1. Whether, notwithstanding the exclusion of psychiatric residents from employee status for purposes of civil service and income reporting, the incidents of an employer — employee relationship in the DMH residency program are sufficient to bind the Commonwealth for acts of the psychiatric resident performed as part of his regularly assigned duties and within the scope of his employment?
2. Considering all of the elements of the relationship between the psychiatric residents and the Commonwealth of Massachusetts, does G. L. c. 12, § 3D insofar as it pertains to legal representation by the Attorney General and indemnification of state officers or employees apply to a resident in psychiatry within the Department of Mental Health?

My opinion is that psychiatric residents are not employees for purposes of G. L. c. 12, § 3D.

With respect to your first question, I cannot, by evaluating the incidents of an employer-employee relationship in the Department of Mental Health residency program, make a determination that the Commonwealth is legally bound for the acts of the psychiatric residents. The question of any such liability has traditionally been subject to the doctrine of sovereign immunity. *E.g., Glickman* v. *Commonwealth,* 244 Mass. 148 (1923). While the doctrine has been recently criticized by the Supreme Judicial Court *(Morash & Sons* v. *Commonwealth,* Mass. Adv. Sh. (1973) 785, 296 N.E.2d 461 (1973)), it would be beyond the function of this office to unilaterally alter it.

Sovereign immunity, however, has been modified to some extent by the Legislature in G. L. c. 12, § 3D, which provides limited (up to $10,000) indemnification for state employees and representation by the Attorney

General. It is the applicability of section 3D to residents which you raise in your second question.

The state has broad regulatory powers over the status existing between an employer and an employee and the Legislature in dealing with this relation has a wide field of discretion. *Price* v. *Railway Express Agency, Inc.,* 322 Mass. 476, 78 N.E.2d 13 (1948). This discretion has been exercised with the enactment of G. L. c. 19, § 10, which specifically places persons in the Department of Mental Health residency program outside the category of "employees".* While clearly a resident is not an "employee" according to G. L. c. 19, § 10, and only employees are included within the limited protection of the indemnification statute, G. L. c. 12, § 3D, you ask whether "employee" in G. L. c. 12, § 3D has a different meaning so as to include residents.

Traditional rules of statutory construction require that if the language of a statute is plain, it is to be interpreted in accordance with the usual and natural meaning of the words. *Commonwealth* v. *Thomas,* 359 Mass. 386, 269 N.E.2d 277 (1971). See G. L. c. 4, § 6, Third. Since the Legislature is presumed to understand and intend all consequences of its own measures, *Spaulding* v. *McConnell,* 307 Mass. 144, 29 N.E.2d 713 (1940), statutes should not be interpreted to avoid injustice or hardship of the language if the statute, taken as a whole, is clear and unambiguous. *Town of Milton* v. *Metropolitan District Commission,* 342 Mass. 222, 172 N.E.2d 696 (1961). It is the job of the Legislature to correct such injustices and hardships.

If the Legislature, by enacting G. L. c. 19, § 10 wanted only to exempt the psychiatric residents from G. L. c. 31, §§ 62 and 62A (and not from other statutes, such G. L. c. 12, § 3D), there would have been no need to further insert the phrase "and shall not be deemed employees of the commonwealth," as it would accomplish nothing more than would the section standing without the phrase and would be superfluous. *Commonwealth* v. *Woods Hole, Martha's Vineyards and Nantucket Steamship Authority,* 352 Mass. 617, 227 N.E.2d 357 (1967). *Selectmen of Topsfield* v. *State Racing Commission,* 324 Mass. 309, 86 N.E.2d 65 (1949). A construction of a statute which would lead to an absurd and unreasonable conclusion is not to be adopted where its language is fairly susceptible to a construction leading to a logical and sensible result. *McCarthy* v. *Woburn Housing Authority,* 341 Mass. 539, 170 N.E.2d 700 (1961); *Berube* v. *Selectmen of Edgartown,* 336 Mass. 634, 147 N.E.2d 180 (1958). In this case there is another reasonable construction of this section; namely, to assume that the words are correct as written and that for all purposes the psychiatric residents are not employees of the Commonwealth. It should be noted that G. L. c. 19, § 10 which classified residents as non-employees, was enacted after the indemnification statute. The Legislature must be presumed to have understood the effect of G. L. c. 19, § 10 on indemnification and representation by the Attorney General.

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*The relevant part of G.L. c. 19, § 10 reads as follows:

"The commissioner may establish a program for the training of residents in psychiatry and any other professional disciplines as required by departmental programs. Such residents shall be eligible for training grants from the commonwealth. Recipients of said grants shall be exempt from the provisions of chapter thirty-one and *shall not be deemed employees of the commonwealth;* and such grants shall not be deemed income under chapters sixty-two or sixty-two A. Approval of such training programs by the personnel administrator shall be required in accordance with the provisions of section twenty-eight of chapter seven." (Emphasis supplied.)

Further, being exempt from c. 31 is not synonymous with not being an employee of the Commonwealth. There are many employees of the Commonwealth who are not subject to the provisions of chapter 31. In fact, the physicians and psychiatrists with full medical-psychiatric responsibility employed by the Department of Mental Health are one example. See G. L. c. 19, § 2.

A previous Attorney General opinion concerning the employment status of student nurses employed by the Department of Mental Health (1950 Op. Atty. Gen. 54) is distinguishable from the instant case. The provision involved there was a rule promulgated by the Commissioner of Mental Health at the instigation of the Committee on Nurses' Training Schools, a subdivision of the Department of Mental Health. The rule provided that nurses were not to be considered state employees because they received grants. The Attorney General found the rule not to be a bar to the loyalty oath requirement contained in G. L. c. 264. While the factual situations are different, both the prior and instant opinions rely upon the priority of clear statutory language. The prior opinion simply stated that a rule must fall to the extent that it conflicts with a broadly drawn statutory definition of employment. In this case there is no such conflict. The Legislature has stated clearly that psychiatric residents are not to be deemed employees of the Commonwealth.

But, to avoid injustice, this opinion should be read as applying only *prospectively.* The Constitution neither prohibits nor requires retrospective effect. *Linkletter* v. *Walker,* 381 U.S. 618, 629 (1965). A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. *Great Northern Railway Co.* v. *Sunburst Oil and Refining Co.,* 287 U.S. 358, 364 (1932). It may make decisions which overrule the previous law effective only prospectively whenever justice or hardship will thereby be averted. *Id.* See also, *Gelpcke* v. *Dubuque,* 1 Wall. 175 (1863). Courts generally do not abolish a clear precedent retroactively when parties may have relied upon it for the prior formulation of obligations. *Powers* v. *Bethelehem Steel Corporation,* 483 F.2d 963, 964 (1st Cir. 1973). Where, in a serious way, an existing interest will be impaired or an expectation disappointed or a reliance defeated, there is occasion to take full precautions to confine a decision to prospective operation. *Diaz* v. *Eli Lily and Co.,* Mass. Adv. Sh. (1973) 1263, 1277-1278.

Any psychiatric residents who have relied on any representations made by the Department of Mental Health or the Department of the Attorney General and are being represented by this Department will continue, in the interests of justice, to be represented. Residents who are defendants in the pending case of *Rogers* v. *Macht,* therefore, will continue to be represented by the Attorney General.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 54 February 13, 1976

Edward F. Flynn, Jr.
Deputy Commissioner of Banks and General Counsel
Office of the Commissioner of Banks
State Office Building
Government Center
100 Cambridge Center
Boston, Massachusetts

Dear Mr. Flynn:

You have requested assistance in resolving an issue related to the implementation of a proposed "Urban Lending Program." You have stated that the Program is designed to eliminate allegations of "redlining" in mortgage lending in the City of Boston. Your specific question concerns the applicability, if any, of Chapters 93 and 93A of the General Laws to a proposed "Urban Lending Program."[1]

Your request, unlike the traditional request for an Attorney General Opinion, essentially asks the Attorney General to indicate his present intention concerning a course of conduct by private parties, which might be considered to violate state law. In other words, rather than advising you concerning matters which are "necessary and incidental to discharge of the duties" of your office, 2 Op. Atty. Gen. 100 (1899), the request indirectly seeks to assure private third parties that no action will be taken against them by the Commonwealth, if they participate in the "Urban Lending Program." While the Attorney General has the authority and discretion to issue an opinion to you concerning this matter, the parameters of my response should be clearly understood to avoid misunderstanding.

Your request resembles the "business review letter" concept utilized by the United States Justice Department. The Justice Department developed the informal practice of conditionally waiving its right to institute proceeding in certain circumstances. See Barnes, "Theory & Practice of Antitrust Administration" in *How to Comply with the Antitrust Laws* 41 (C.C.H., 1954). In 1964 the procedure was formalized and somewhat extended by regulation. 28 C.F.R. §50.6. Also see Schwartz, *Free Enterprise and Economic Organizaton, Antitrust and Regulatory Controls.* Although I do not intend to adopt the existing practice with respect to "business review letters," certain limitations on the scope of such letters, however, are applicable. Specifically, my opinion should be read with the following factors in mind:

1. It only represents my *present* intention not to bring any action.
2. It is assumed that full and true disclosure by all parties has been made.
3. My opinion is limited to the proposed plan and any actions which go beyond or alter the scope of the proposal are not covered.
4. The Attorney General remains completely free to bring whatever

[1]G.L. c.93, §2 prohibits contracts, agreements, arrangements, combinations or practices whereby a monopoly is or may be created or whereby trade is restrained. G.L. c.93A generally prohibits unfair methods of competition, as well as unfair or deceptive acts of practices in the conduct of any trade or commerce.

action or proceeding he subsequently comes to believe is required by the public interest.

5. To the extent other private parties may have a basis for a claim, this letter cannot abrogate their rights.

See 28 C.F.R. §50.6; *United States* v. *Firestone Tire & Rubber Co.* 374 F. Supp. 431, 433-34 (N.D. Ohio 1974); also see generally, Neale, The *Antitrust Law of the U.S.A.* (Cambridge University Press, 1974).

On the basis of the materials and information you have forwarded, it appears that the program involves a voluntary cooperative effort between your office, certain Boston Savings Banks, and community representatives to attempt to insure that residential home mortgage loans will not be denied solely on the basis of the location of the property. The program would permit any applicant for a mortgage on 1-4 family, owner occupied residential property in Boston to obtain review of a denial of a mortgage loan. Under the program, notice of a mortgage loan denial by any of the participating banks would be accompanied by a form explaining the method by which the applicant can obtain review of that denial.

The proposal indicates that a Mortgage Review Board, consisting of representatives selected by the participating banks as well as representatives of the Banking Commissioner and representatives from the community would review the application to determine whether the denial of the loan was based on the location or neighborhood in which the property was situated. In conducting their review, the Board is to be guided by criteria enumerated in the proposal, including credit standards which an applicant must satisfy, as a means of evaluating the reason for the denial of the loans. If the Board determines that the denial of the loan was based on the location of the property, the Board would suggest reversal of the original denial or suggest reversal with qualifications. In all other circumstances, the Board would confirm the denial.

It is also my understanding that no bank will be compelled to accept the Board's suggestion of reversal of a denial of a mortgage loan. If the bank which originally denied the loan refuses to accept the Board's suggestion of reversal, the Secretary of the Board will solicit other banks in the program to make the loan on a voluntary basis.

On the basis of the documents which you have submitted, it is my opinion that the proposal does not violate either Chapter 93 or 93A of the General Laws. With respect to these statutes, I must, however, express my concern that the criteria for evaluating the reason for denial of the original loan serve only the limited purpose of providing a framework within which the Review Board can evaluate the merits of an appeal. My opinion is premised upon my understanding that Savings Banks involved in the program will continue unilaterally to adopt interest rates and credit standards without regard to any guidelines or standards set forth in the plan, and that any review standards or guidelines adopted by the Board shall be utilized solely for the purpose of evaluating applications which are submitted to the Board.[2]

[2]The Justice Department's Antitrust Division has recently issued a favorable business review letter to the Banks involved in this program. The letter, however, similarly cautions that its conclusion is premised on the participating banks continuing to unilaterally establish their own terms and rates with respect to loans.

In sum, it is my opinion that the proposed Urban Lending Program does not on its face violate either Chapter 93 or Chapter 93A of the General Laws. Consequently, I do not presently intend to initiate any action with respect to the program. In view of my opinion that the plan does not violate Chapter 93A, I deem it unnecessary to address the suggestion in your letter that Savings Banks may be exempt from Chapter 93A.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 55 February 20, 1976

Mr. John P. Larkin
Executive Secretary
Alcoholic Beverages Control Commission
100 Cambridge Street
Boston, MA. 02202

Dear Mr. Larkin:

You have requested my opinion concerning the appellate jurisdiction of the Alcoholic Beverages Control Commission (ABCC) with respect to "the increasing or decreasing of the hours of operation of licensees between the hours of 11:00 p.m. and 2:00 a.m." Your question principally involves the interpretation of the words "modification" as found in G.L. c. 138, §67, which outlines the appellate authority of the ABCC. For reasons stated below, I respectfully decline to render an opinion.

This issue has been raised frequently and most recently in proceedings before the Licensing Board for the City of Boston and the ABCC concerning Colonial Tavern, Inc. d/b/a Jacques Restaurant and Profile Lounges, Inc. d/b/a The Other Side. The ABCC, by majority vote, denied a petition for rehearing brought by these corporations, based upon the long standing practice of the Commission to limit its jurisdiction to the hours from 11:00 a.m. to 11:00 p.m. with statutory authority to either increase or decrease such hours reserved to local authorities. However, the Commission advised the petitioners in the above-mentioned cases that an opinion of the Attorney General would be sought concerning the ABCC's decision in this matter.

As you note in your opinion request, this is not the first time that this issue has been presented to the Commission. In fact, in reviewing the files of the Attorney General's office, I find that there are at least two active cases, presently in litigation, concerning essentially the same issue. The cases of *Limelight Corporation v. McAuliffe* (Worcester Superior Court, No. 3678) and *Tar & Feather, Inc. v. Zangrilli* (Essex Superior Court, No. 21631) involve an issue virtually identical to the one which prompted your opinion request. Similarly, the case of *Limelight v. Harrington* (Suffolk Superior Court, No. 10359) involves a case where the ABCC found it did not have jurisdiction over a change in closing hours after 11:00 p.m.

While I recognize the public interest in the cases which prompted your opinion request, I see no reason to alter the long standing practice of the

Attorney General's office to decline to issue an opinion on a matter which is the subject of litigation. See 6 Op. Atty. Gen. 438 (1922) cited most recently in Op. Atty. Gen. 75/76-17 (July 31, 1975). An Attorney General's Opinion performs the important function of advising state agencies and officials concerning the law of the Commonwealth. However, it is not the function of such opinions to intervene in ongoing and active litigation involving precisely the same issues, particularly where the Attorney General already represents a party in such litigation. I, therefore, respectfully decline to render an opinion. This is not to be construed as an opinion with respect to your undoubted powers to act upon revocations or license board actions you consider to be revocations.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 56 March 2, 1976
Honorable Robert Q. Crane
Treasurer of the Commonwealth
State House
Boston, Massachusetts

Dear Treasurer Crane:

You have asked that I review the Deferred Compensation Plan for employees of the Commonwealth as to whether the plan grants to an employee:

1. The right to receive, prior to his severance from the service of the Commonwealth, all or part of the compensation which has been deferred pursuant to the plan; or
2. Any rights in insurance contracts purchased in connection with the plan.

In answer to your first question, the plan generally prohibits a participant from receiving any deferred compensation prior to his severance from service. However, Article VII of the plan does establish a limited exception. The article provides:

VII. WITHDRAWALS

> For serious financial reasons, a Participant may apply to the Committee for withdrawal from the Plan prior to retirement or other termination of the Participant's service with the Commonwealth. Such early withdrawal shall be permitted only in the event of real emergencies which are beyond the Participant's control and which will cause the Participant a great hardship if early withdrawal is not permitted. The amount withdrawable will be limited to that necessary to meet the specific situation. Withdrawals for foreseeable expenditures, normally budgetable, will not be permitted. Foreseeable expenditures will normally include such items as the down payment on a home, vacation expenses,

> purchase of an automobile, or college expenses. Upon approval from the Committee, and within fifteen days thereafter, the Participant will be deemed to have withdrawn from the Plan and distribution of the amounts necessary will be made in a one time payment. Future participation will be subject to the provisions of Section 4.02(c) of Article IV.

Thus, a participant may receive such sums as are necessary to alleviate "real emergencies," which occur prior to his severance from service. There are no other exceptions to the rule.

With respect to your second question, Article XI of the plan is controlling. That article states:

> XI. NON-FUNDING OF BENEFITS
>
> If the Commonwealth shall acquire any investment or assets in connection with the liabilities assumed by it hereunder it is expressly understood and agreed that neither the Participant nor any Beneficiary of the Participant shall have any right with respect to, or claim against such investment or asset. Such investment or assets shall not be held in any way as collateral security for the fulfilling of the obligations of the Commonwealth under this Plan, and shall be subject to the claims of creditors of the Commonwealth.

Thus, a participant possesses no rights in insurance contracts purchased in connection with the plan.[1] Unlike the rule previously discussed, this rule is absolute.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

March 2, 1976

Number 57
Frederick P. Salvucci
Executive Secretary
Office of Transportation and Construction
One Ashburton Place
Boston, Massachusetts 02108

Dear Secretary Salvucci:

You have forwarded to me a request for an opinion from Commissioner Carroll of the Department of Public Works concerning the regulation of the weights of trucks using the highways of the Commonwealth. Specifically you ask:

> Is the Commissioner of Public Works required to issue a permit for the maximum reducible weights permitted by statute to an applicant who satisfies the standards of registration, inspection and certification enumerated in Chapter 85, Section 30A, or

[1]Indeed, to find otherwise would defeat the entire purpose of deferred compensation plans. A right in any such insurance contract, which offers a present economic benefit, would be considered taxable by the Internal Revenue Service.

may the Commissioner refuse to issue, or limit the scope of the permit under Section 30A for reasons such as public safety, protection and capacity of highways and bridges, as dictated by sound engineering and professional judgment?

Analytically the question you ask may be broken into three parts: (1) Whether the issuance of permits is mandatory or discretionary, (2) Whether the Commissioner may utilize such criteria as the public safety in making his decision, and (3) Whether the Commissioner may limit the scope of the permits issued. I am of the opinion that both the issuance of permits and the criteria to be issued for issuance are committed to the discretion of the Commissioner, subject, of course, to constitutional and statutory limitations. I further conclude that the Commissioner possesses discretionary authority to limit the scope of permits issued. The reasons for my opinion are set out below.

Chapter 851 of the Acts of 1974 revised the statutory scheme regulating the weight of loads which trucks may carry and established a permit system whereby vehicles could move loads higher than the statutory maximum.[1] In 1975 the legislature again addressed the problem of overweight loads and passed Chapter 494, which amended the substance of the regulatory system and Chapter 593, which deferred the effective date of several provisions of the earlier chapters until March 1, 1976. In their current form both M.G.L. c.85, §30 and c.90, §19A impose limitations on the amount of weight trucks operating within the Commonwealth may carry. Vehicles may carry loads in excess of these limitations only if a permit is obtained from the Commissioner of Public Works in accordance with M.G.L. c.85, §30A.

A reading of Section 30A indicates that the issuance of permits is discretionary, since it provides that the Commissioner "may" issue permits to applicants meeting certain minimum standards. Our Supreme Judicial Court has consistently held that the word "may" is ordinarily a word of permission rather than command and its use in a statute normally indicates discretion. *Commonwealth* v. *Gordon,* 354 Mass. 722 (1968); *City Bank & Trust Co.* v. *Board of Bank Incorporation,* 346 Mass. 29 (1963).

Similarly, the language of Section 30A supports the proposition that the Commissioner may consider factors of the type enumerated in your request when deciding to issue a permit. Applications for overload permits are to be filed on forms provided by the Commissioner, which forms "shall include but not be limited to" five specific details of operation. If the legislature has authorized the Commissioner to seek additional information from applicants, it must have contemplated use of that information in his decision-making process.

Section 30A further provides that "within seven days of receipt of [an] application the Commissioner of Public Works shall notify the applicant of the approval or disapproval of his application." I am of the opinion that the

[1]On January 14, 1975, my predecessor issued a formally numbered opinion dealing with Chapter 851 to the Chairman of the Special Overload Commission established by the General Court. 1974-75 Op.Atty.Gen. #47. The text of the opinion indicates that it was intended as an informal opinion and its value as a precedent is questionable, since the Attorney General may not issue a formal opinion to individual legislators or the Chairmen of such Commissions. I agree with the conclusion expressed in that opinion that the Commissioner may not unilaterally adopt a policy refusing to issue any overload permits but note the statement in your request that the Commissioner has not adopted such a policy.

authority to limit the scope of permits is necessarily included in the Commissioner's greater powers of disapproval. Clearly the Commissioner could limit the scope of permits by other indirect means, and I conclude that he also possesses the implied authority to impose direct limitations on permits.

In the Commissioner's letter he requests a prompt reply because of the effective date of the statute. I am of the opinion that the issuance of overload permits is an integral part of the law and suggest deferred enforcement until the permit system is in force. As my predecessor has already noted in his opinion, it would be inconsistent with legislative intent to enforce the weight limitations without providing for permits. A system where permits are available in theory but not in practice would violate the legislative mandate.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 58 April 2, 1976

Representative Richard H. Demers
Chairman, Committee on Commerce & Labor
State House, Room 43
Boston, Massachusetts 02133

Dear Representative Demers:

The Committee on Commerce & Labor has requested my opinion as to whether St. 1971, c. 771, G.L. c. 91, App. 1-3(q) would conflict with or prohibit the implementation of Senate Bills, Numbers 60, 68 and 107.

St. 1971, c. 771 authorized and empowered the Massachusetts Port Authority:

> To apply for, establish, operate, and maintain . . . a foreign trade zone and sub-zone in the Commonwealth in accordance with the Foreign Trade Zone Acts of 1934, [19 U.S.C. §81a-81u].

The Committee has specifically asked whether this provision would prohibit "entities other than the Massachusetts Port Authority from applying to the Foreign Trade Zone Board" and bar the passage of the pending Senate Bills.

Senate Bill No. 60 would authorize the mandate of the Massachusetts Port Authority to establish a foreign trade zone at the South Boston Annex of the Boston Naval Ship Yard; Senate Bill No. 68 would establish a Commission to study the feasibility of establishing a world trade mart at the Boston Fish Pier; Senate Bill No. 107 would authorize the City of New Bedford to apply for and operate a foreign trade zone.

I have concluded that there is no bar to the passage of legislation authorizing additional entities to apply for the right to operate a foreign trade zone in the Commonwealth. St. 1971, c. 771 merely authorized Mass. Port to apply for foreign zone status and did not create an exclusive right.

Further, the federal Foreign Trade Zone Act of 1934 permits state legislation which would allow additional entities to apply for foreign trade zone status. The Act states that "each port of entry [within a state] shall be entitled to at least one zone, subject to approval by the Foreign Trade Zone Board" 19 U.S.C. §81(b)b, and merely requires legislative action in certain circumstances when the proposed applicant is a public corporation. 19 U.S.C. §78 (b)d. The Act places no further restriction on the permissible number of zones within a state, requiring only that, to be approved, proposed zones must be "suitable for the accomplishment of the purpose of a foreign trade zone . . ." 19 U.S.C. §81g.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 59 April 2, 1976

Commissioner Nicholas Roussos
Department of Labor and Industries
100 Cambridge Street
Boston, Massachusetts 02202

Dear Commissioner Roussos:

You have asked my opinion concerning the legality of G.L. c. 23, §1 which requires, in part, that the Assistant Commissioner of the Department of Labor and Industries be a woman:

> There shall be a department of labor and industries, under the supervision and control of a commissioner of labor and industries, in this chapter called the commissioner, *an assistant commissioner who shall be a woman,* and three associate commissioners, one of whom shall be a representative of labor and one a representative of employers of labor. (emphasis supplied)

I find that G.L. c. 23, §1 violates the equal protection clause of the 14th Amendment to the United States Constitution and is, therefore, unconstitutional. I also find that the statute violates Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000(e) *et seq.,* and the Massachusetts Fair Practices Act. G.L. c. 151B, §4.[1]

G.L. c. 151B, §4 and Title VII of the Civil Rights Act of 1964 prohibit failures or refusals to hire or employ on the basis of sex. The requirement that the assistant commissioner be a woman would, in the absence of a *bona fide* occupational qualification, be discrimination in employment on the basis of sex. However, where sex is a "*bona fide* occupational qualification to the normal operation of that particular business or enterprise," it shall *not* be an unlawful employment practice for an employer to hire or employ persons on the basis of sex. 42 U.S.C. §2000e-2(e).

[1]G.L. c. 151B provides that any state law to the contrary is effectively repealed, except for certain specifically cited statutes not here relevant. G.L. c. 151B, §9.

Courts which have found a *bona fide* occupational qualification have relied upon three different standards:

1) "All or substantially all women would be unable to perform safely and efficiently the duties of the job involved." *Weeks v. Southern Bell Telephone & Telegraph Company,* 408 F.2d 228 (5th Cir. 1969).
2) ". . . the essence of the business operation would be undermined by not hiring members of one sex exclusively." *Diaz v. Pan American World Airway, Inc.,* 442 F.2d 385 (5th Cir. 1971), *cert. denied,* 404 U.S. 950 (1971).
3) ". . . . sexual characteristics are crucial to successful job performance." *Rosenfeld v. Southern Pacific Company,* 444 F.2d 1219 (9th Cir. 1971).

The assistant commissioner performs administrative duties "relating specifically to women and minors" and exercises authority as may be prescribed by the Commissioner. G.L. c. 23, §6. I find that there is no duty of the assistant commissioner for which sex is a *bona fide* occupational qualification and for which one sex is, therefore, exclusively qualified. The mere fact that the job requires dealing with "women and minors" does not suggest a contrary result. The *bona fide* occupational qualification exception cannot be met by any of three standards referred to above and, therefore, the position of assistant comissioner in the Department of Labor and Industries cannot be denied to a qualified person based on the individual's sex.

Since G.L. c. 23, §1 limits the position of assistant commissioner to that of the female sex and deprives males of an employment opportunity and since the *bona fide* occupational qualification cannot be met to justify such discrimination, the statute is a *prima facie* violation of G.L. c. 151B, §4, of the Civil Rights Act of 1964, 42 U.S.C. §2000(e)-2(a), and the equal protection clause of the 14th Amendment.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 60 April 12, 1976
Honorable Robert Wood
President, University of Massachusetts
One Washington Mall
Boston, Massachusetts 02108

Dear President Wood:

You have requested my opinion relative to the following question:

> Are lodging accommodations provided at the University of Massachusetts Campus Center subject to the room occupancy excise imposed by G.L. c. 64G?

The campus Center was constructed by the University Building Authority pursuant to the provisions of St. 1960, c, 773, *as amended.* It is currently operated by the Board of Trustees of the University under a "Management and Services Agreement" between the Authority and the Board of Trustees. The Center serves as a facility for dining, housing and extra-curricular activities at the University's Amherst Campus.

In arriving at my opinion, I need not look beyond the provisions of G.L. c. 64G, §2(a), which declare:

> The provisions of this chapter shall not be construed to include lodging accommodations at . . . state . . . institutions . . .

As part of a facility constructed and operated by state bodies for the purpose of serving the state university, the lodging accommodations provided at the Campus Center clearly constitute "lodging accommodations" at "a state institution". *See* G.L. c. 75, §1. Therefore, by the explicit terms of G.L. c. 64G, §2(a), those accommodations are exempt from the room occupancy excise.[1] Accordingly, I answer your question "No."

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 61 April 12, 1976
Commissioner John F. Snedeker
Metropolitan District Commission
20 Somerset Street
Boston, Massachusetts 02108

Dear Commissioner Snedeker:

You have requested my opinion regarding a proposed transfer of land in East Boston from the Massachusetts Port Authority (Massport) to the Metropolitan District Commission (MDC). Specifically you have asked whether legislation authorizing the transfer is required by Article 97 of the Articles of Amendment to the Constitution of Massachusetts or by the doctrine of "prior public use."

You have advised me that the land, known as the Belle Isle Marsh area in East Boston, was acquired by Massport through exercise of its powers of eminent domain to protect aerial approaches to runways at Logan Airport and is presently being used for that purpose. Massport is willing to grant a revocable permit to the MDC to use the land for passive recreational purposes. Alternatively, Massport is willing to convey the land, but would require payment of reasonable consideration.

The MDC has previously acquired adjacent land, formerly the Suffolk Downs Drive-In Theater, on which it intends to build a skating rink. It

[1]While G.L. c. 64G, §2(b) contains a separate exemption for "lodging accommodations at . . . educational . . . institutions . . .," I do not reach the question of whether the lodging accommodations in question qualify for that exemption as well.

wishes to utilize the Belle Isle Marsh land for passive recreational purposes, such as wildlife conservation. No construction would be undertaken.

Article 97 of the Amendments to the Constitution of Massachusetts provides:

> The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural scenic historic and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.
>
> The general court shall have the power to enact legislation necessary or expedient to protect such rights.
>
> In furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefor, or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.
>
> Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court.

The public purposes defined in Article 97 are "the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources." Only land and interests in land taken or acquired by the Commonwealth for "such purposes" are subject to the requirement of a two-thirds vote of each branch of the General Court before a change in use or other disposal is permitted.

Since the land in question was acquired for airport purposes and not for the conservation-related purposes enumerated in Article 97, Article 97 would not restrict transfer of the land by Massport.[1] However, it is my opinion that the transfer of this land by Massport to the MDC would involve diversion of property from one public use to another inconsistent use and, therefore, needs to be evaluated in light of the doctrine of "prior public use." If the doctrine is applicable, specific legislative approval, by majority vote, would be necessary whether the transfer is by sale or by revocable permit.

The doctrine of prior public use is a judicially evolved doctrine. The essence of the doctrine, as stated in the leading case of *Robbins v. Department of Public Works*, 355 Mass. 328 (1969) is that "public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion." The doctrine has been most stringently applied to park land, see *Robbins, supra;* however, it has been applied to land held for other purposes, such as flood control, *Commonwealth v. Mass. Turnpike Authority,* 346 Mass. 250 (1963). Here, land taken and held for airport purposes would be diverted to recreational purposes. The authorization for the acquisition of land by the MDC for the

[1]As noted below, Article 97 might restrict any future transfer of the land by MDC if it is considered to have "acquired" the property or interest.

East Boston recreational facilities, found in St. 1971, c. 976, § 2C only refers to land in East Boston, and does not specifically contemplate the taking of land at this particular location, now used for airport runway protection.[2] Therefore, before the land can be diverted from airport-connected to recreational uses, it is my opinion that specific legislative authorization is required.

Further, in my opinion the acquisition of this land through purchase by the MDC for purposes covered by Article 97 would restrict its later transfer from the MDC. The land would be taken by the MDC in connection with the construction of a skating rink and other recreational facilities planned for adjacent land. The MDC does not intend to use this piece of land for construction but for passive uses, such as a bird sanctuary with walking trails. Article 97 has been interpreted in a prior Opinion of the Attorney General to apply to public lands acquired for parks, monuments, reservations, athletic fields, concert areas and playgrounds. 1972-73 Op. Atty. Gen. p. 139, 143. Acquisition of this land for recreational purposes would fall within the terms of Article 97, particularly where it is my understanding that a portion of the land is protected "wetlands" property. In other words, if MDC purchased the land, a later transfer would clearly require the 2/3 vote contemplated by Article 97.

The remaining questions are whether the transfer of control of the land to the MDC under a *revocable permit* would be considered an acquisition under Article 97, which would restrict a subsequent transfer back to Massport, and the impact of the doctrine of prior public use. Article 97 applies to lands and easements or other interests taken upon payment of just compensation, or acquired "by purchase or otherwise". Mere MDC control over this land could be interpreted as "acquisition" of such an "other interest". However, where the interest taken by the MDC is as speculative in nature as a permit, revocable by Massport at any time, it should not be considered an acquisition within the terms of Article 97.

The clear purposes of Article 97 are to authorize the acquisition of land for conservation purposes, and to ensure that land once made a part of the Commonwealth's holdings for conservation purposes is not altered in use or disposed of without legislative authorization. Where control of the Belle Isle Marsh land by the MDC is acquired under circumstances known to be temporary by the acquiring agency and is subject to revocation at any time, it would not in my opinion be an interest acquired "to accomplish the purposes" of Article 97. Therefore, the requirement in Article 97 of a 2/3 vote of the legislature would not be imposed.

However, the doctrine of prior public use would be applicable to a subsequent change in use, even due to the revocation of a permit. Unless the legislation enabling the transfer of the land by Massport permitted later revocation of the permit and return of the land to Massport without further legislative approval, a subsequent transfer would require legislative approval by a majority vote of the legislature.

In summary, (1) I find that the proposed transfer of the Belle Isle Marsh land by Massport to the MDC, whether by revocable permit or otherwise,

[2] *Compare, City of Boston v. Massachusetts Port Authority*, 356 Mass. 741 (1970); *Appleton v. Mass. Parking Authority*, 340 Mass. 303 (1960).

would require a majority vote of the legislature. (2) If the transfer is by way of revocable permit, then a subsequent transfer or change in the use of the land would not be subject to the restrictions of Article 97. Legislative approval for a subsequent transfer or change in the use of the land would be required by the doctrine of prior public use, unless legislation enabling the transfer by Massport authorized the return of the land to Massport without further approval. (3) If, however, the transfer is by way of purchase, then any subsequent transfer or change in use of the land would be subject to the provisions of Article 97 and would require a 2/3 vote of the legislature.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 62 April 13, 1976

Professor Arthur R. Miller
Chairman, Security and Privacy Council
131 Tremont Street
Boston, Massachusetts 02111

Dear Professor Miller:

You asked my opinion on the following two questions:

(1) Does G.L. c. 6, §175 give individuals the right to copy, if practicable, all criminal offenders record information (CORI) held on them, including personal information compiled by criminal justice agencies for the purpose of identifying them or is the right to copy created by this section limited to that portion of CORI which is not personal identifying information?

(2) Does G.L. c. 6, §175 give individuals the right to take a photograph or make a photocopy of their CORI which is not personal identifying information?

My opinion is that individuals may, when it is practicable, obtain copies of their CORI which contains personal identifiers and that copies may be made by any practicable means.

G.L. c. 6, §175 provides that "each individual shall have the right to inspect, and, if practicable, copy, criminal offender record information which refers to him." Your first question, however, asks whether the criminal offender record information (CORI), for purposes of this section, includes personal identifying information.

It is my view that the legislature intended to permit an individual to copy the entire CORI, including personal identifying information. Statutes are to be read according to the ordinary meaning of the words. *Chatham Corp. v. State Tax Commission,* 1972 Adv. Sh. 1297, 285 N.W. 2d 420 (1972). Since the definition of CORI in G.L. c. 6, §167, clearly provides that CORI is maintained according to the identity of each offender, a copy made for the

named individual pursuant to G.L. c. 6, §175, should therefore also contain the identity of the offender.[1]

I reach this conclusion after careful consideration of the construction of this statute which has been made by the Criminal History Systems Board, the state agency principally responsible for governing criminal records. G.L. c. 6, §168 ff.[2] The Board's view is entitled to weight in resolving ambiguities in the language of the statute. *Devlin v. Commissioner of Correction,* 1973 Adv. Sh. 1601, 305 N.E. 2d. 847, *Town Crier, Inc. v. Chief of Police of Weston,* 1972 Adv. Sh. 891, 282 N.E. 2d. 379, 382, n.6. Here, however the language of G.L. c. 6, §§167 and 175 is not ambiguous. If all of the language of these two sections is to be given meaning, *Board of Assessors of Newton v. Pickwick Limited,* 351 Mass. 621 (1970), individuals should be able, where practicable, to obtain copies of their CORI containing personal identifiers.

An individual may make a copy of his record by any means practicable and reasonable. This may include the laborious task of manual duplication or the more modern processes of photocopying or computer printouts. Such methods are permitted by Regulation 3.4 of the Criminal History Systems Board and are valid interpretations of the word "copy" in G.L. c. 6, §175. Copying by any form, of course, is expressly made contingent upon practicability. G.L. c. 6, §175.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 63 April 15, 1976
Leroy Keith, Chancellor
Board of Higher Education
182 Tremont Street
Boston, Massachusetts 02111

Dear Chancellor Keith:

On behalf of the Board of Higher Education (the Board) you have asked for my opinion as to whether the Board has the statutory authority to adopt a policy concerning admission requirements of private institutions granting collegiate-level degrees. You state that the Board has deferred promulgation or implementation of its policy pending an opinion of this Department. The policy provides as follows:

Policy on Admissions for Private Sector
("Independent") Institutions under the
Purview of the Board of Higher Education

[1]CORI is defined in G.L. c. 6, §167, as "records and data compiled by criminal justice agencies for the purposes of *identifying* criminal offenders and of maintaining *as to each offender* a summary of arrests, pretrial proceedings, the nature and disposition of criminal charges, sentencing, incarceration, rehabilitation, and release." (emphasis added)

[2]Regulation 3.4 of the Rules and Regulations of the Criminal History System Board (December 17, 1974) provides in part: "Before releasing any exact reproduction or hard copy of CORI to an individual, the agency holding the same shall remove all personal identifying information from the CORI."

> In order to protect the public interest and the needs of the citizens of the Commonwealth, the Board of Higher Education will approve only those Articles of Organization of a collegiate level degree granting institution or those Articles of Amendment to the charter of an existing collegiate level degree granting institution which provide for an admissions policy making eligible for consideration for admission to or enrollment in the institution all educationally qualified, financially able persons, such policy thereby not restricting admissions and enrollees exclusively to employees of a particular industry or corporation or to client groups of such bodies. Published admissions policies in institutional catalogues and promotional material will be reviewed on a routine basis for compliance with the intent and purpose of this policy.

Your inquiry about the validity of this policy divides analytically into two separate questions: (1) whether the statutes governing the Board's duties and its responsibilities relating to private degree-granting institutions in particular permit the Board to adopt such a policy or standard; and (2) assuming the statutes authorize the Board's action, whether the procedure the Board followed in adopting the policy was valid. I discuss separately each of these issues.

1. *The Board's authority to adopt the policy.*

Under G.L. c. 15, § 1D the Board is given broad supervisory powers over the Commonwealth's entire system of public higher education, its general mandate being to "promote the best interests of all public higher education throughout the Commonwealth." G.L. c. 15, § 1D, second paragraph. The Board's specific power over collegiate-level, private institutions is set forth in G.L. c. 69, §§ 30 *et seq.* The two sections relevant to your inquiry are §§ 30 and 31.

Section 30 requires the Board to investigate and pass on the qualifications of any college, junior college, university or other educational institution which seeks to incorporate as, or to amend its articles of organization to become, a degree-granting institution.[1] Section 31 delineates thirteen standards or conditions which the board must follow in acting on an educational institution's proposed certificate of organization or articles of amendment under § 30. These standards relate to levels of instruction and form of organization; faculty, admissions and graduation requirements; adequacy of library and laboratory facilities and equipment; and financial structure. An institution must satisfy all these standards in order to obtain the Board's approval.

The admissions policy adopted by the Board is essentially intended to operate as a rule of general application. However, neither G.L. c. 69, § 30 nor § 31 explicitly grants the Board the power to adopt rules or regulations as a means of implementing the provisions of these sections. Furthermore, none

[1]Specifically, the Board is required to: investigate "the institution, its faculty, equipment, courses of study, financial organization, leadership, and other material facts relative thereto;" hold a public hearing on these issues as part of its investigation; make a determination approving or disapproving the proposed certificate of organization or articles of amendment which the institution has filed with the Secretary of State; and report its findings to the Secretary. The Board's approval is a pre-requisite to the Secretary's endorsement of approval on the certificate of articles of amendment which the institution has filed.

of the thirteen conditions listed in § 31 explicitly relates to the ability of a degree-granting institution to restrict its admissions to employees of a particular industry.[2] The answer to the question of the Board's authority to adopt the policy under review depends, then, on whether (1) G.L. c. 69, §§30-31 impliedly vest a rule-making authority in the Board, and (2) the particular policy or rule adopted by the Board is substantively consistent with the terms of these sections. I answer both of these subsidiary questions in the affirmative.

As a general principle of administrative law, an agency charged with responsibility for implementing a statute has the power to adopt interpretive rules or regulations to clarify its intended application of the statute and guide those whose activities will be governed by it. *See, e.g., Morton v. Ruiz,* 415 U.S. 199, 231 (1974); *School Committee of Springfield v. Board of Education,* 362 Mass. 417, 441-42 (1972); *Cleary v. Cardullo's, Inc.,* 347 Mass. 337, 343-44 (1949). In my opinion, this principle applies to the Board's investigatory responsibilities over private degree-granting educational institutions prescribed by G.L. c. 69, §§30-31. Although § 31 does set forth an extensive list of standards which the Board must follow in performing these functions, each standard is phrased in broad and general terms. In these circumstances, it seems both permissible and appropriate for the Board to flesh out the requirements of the statute by adoption of interpretive rules or policy statements. *See School Committee of Springfield* v. *Board of Education, supra.*[3]

I am also of the view that in substantive terms the particular policy adopted by the Board represents a valid exercise of its implied rule-making power under c. 69, §§ 30-31. The thirteen standards or conditions set forth in § 31 relate to several specific aspects of an educational institution's program, but, as described above, each is couched in general language. While none of them deals specifically with the issue which the Board's policy addresses, the policy supplements and is consistent with their terms. *Cf. Druzik v. Board of Health of Haverhill,* 324 Mass. 129, 136 (1949). I note two of the statutory standards in particular: § 31, Second, which provides in part that "[t]he general character of the institution, its professional outlook, and the character and quality of its leadership and personnel shall be determining factors in the [Board's] approval of the institution;" and § 31 Fourth (quoted at n.2, *supra)* which sets the basis for admission to an institution seeking degree-granting approval as satisfactory completion of a secondary school program or its equivalent. In light of the Board's broad mandate to promote and develop public higher education for the benefit of all Commonwealth residents, it seems well within the Board's authority to interpret G.L. c. 69, §§ 30-31 so as to require that a degree-granting institution keep its admissions open to all academically qualified and financially able applicants.

2. *The procedure used by the Board in adopting its policy.*

While I have concluded that the Board possesses rule-making authority

[2]The single standard concerning admissions requirements provides that "[t]he basis for admission to the institution [seeking approval] is the satisfactory completion of a secondary school program, or its equivalent." G.L. c. 69, § 31, Fourth.

[3]That the Board is explicitly *required* under c. 69, § 30A to establish certain standards for educational institutions whose certificate of organization or articles of amendment it has already approved does not mean that the Board is not *permitted* to establish similar standards under §§ 30 and 31.

under G.L. c. 69, §§ 30-31, the procedure the Board followed in adopting the policy at issue raises a different question. It appears that the Board approved this policy simply by a vote of its members. It neither held a public hearing, gave public notice that it was considering adoption of the policy, nor invited any comments or arguments from interested parties. The Massachusetts courts have made clear that compliance with these types of procedures is necessary to render the policy a binding rule or regulation of the Board.

The Board is an agency subject to the Commonwealth's administrative procedure act, G.L. c. 30A. *See id.*, § 1(2). The "policy" the Board has adopted constitutes a "regulation" as defined in c. 30A, § 1(5) — a "requirement of general application and future effect . . . adopted by an agency to implement or interpret the law enforced or administered by it": it is intended to apply generally to all private educational institutions under the Board's purview, and it establishes on a prospective basis an admissions standard which the institutions must meet to obtain degree-granting authority. *See Kneeland Liquor, Inc. v. Alcoholic Beverages Control Commission,* 354 Mass. 408, 414 (1968).[4]

Once the policy is properly defined as a "regulation" under c. 30A, however, other statutory provisions come into play which require the Board to follow specific procedures for the regulation's effective adoption, promulgation and implementation. Specifically, the Board must choose between the following alternatives:

(1) It may give all interested persons notice and an opportunity to present data, views or arguments on the proposed regulation in accordance with G.L. c. 30A, § 3, and file any regulation it adopts with the Secretary of State pursuant to G.L. c. 30, §37. *See Commissioner of the Department of Community Affairs v. Boston Redevelopment Authority,* 362 Mass. 602, 617-18 (1972); *cf. Massachusetts General Hospital v. Commissioner of Public Welfare,* 346 Mass. 739, 740 (1964);

(2) Upon deciding the application of one *particular* educational institution seeking degree granting authority, the Board, in making its findings under G.L. c. 69, § 30, may announce a general standard that it is applying to the case at hand and also that it intends to apply to other similar future decisions. Such a statement will not be binding beyond the one case being decided, but will be an announced posture and have guidance and predictive value. *See Securities and Exchange Commission v. Chenery Corp.,* 332 U.S. 194, 201-03 (1947).[5]

It is clear that the procedure the Board has followed in adopting the policy you have asked me to review did not comply with any of the methods of rulemaking I have outlined. As a result, the policy can have no binding effect on any of the educational institutions to whom it is intended to apply.

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[4]The fact that the Board has used the term "policy" rather than "regulation" is not conclusive for purposes of defining the legal requirements applicable to its adoption. *See, e.g., Columbia Broadcasting System v. United States,* 316 U.S. 407, 422 (1922); *Kneeland Liquor, Inc. v. Alcoholic Beverages Control Commission, supra.*

[5]Rather than issuing a broad general policy the Board might, at the request of any interested person, render an "advisory ruling" with respect to the applicability to any person, property or state of facts of any statute or regulation enforced or administered by the Board. G.L. c. 30A, §8. Under this method, compliance with the requirements governing adoption of regulations is not necessary.

Massachusetts General Hospital v. Commissioner of Public Welfare, supra. The Board is free, however, to cure this procedural defect by reconsideration of its policy in accordance with one of these methods.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 64 April 21, 1976

Robert J. Kane
Executive Director
Committee on Criminal Justice
The Commonwealth of Massachusetts
80 Boylston Street
Suite 725-740
Boston, Massachusetts 02116

Dear Mr. Kane:

You have requested my opinion concerning the definition of the word "competitive" as it appears in G.L. c. 156A, § 6, which authorizes the Proposal Review Board of the Committee on Criminal Justice to "evaluate and approve or disapprove competitive applications to the committee for funding." Further clarification of your request is contained in an attached memorandum, where you ask:

> . . . whether that [authority to evaluate and approve or disapprove a competitive application to the committee for funding] gives the Proposal Review Board final say over the entire block program or whether it[s] [authority to evaluate and approve or disapprove a competitive application to the committee for funding] is limited to only those programs which the committee has designated specifically as competitive programs . . . .

In other words, you ask whether the Proposal Review Board has the authority to approve or disapprove all applications for grants, whether those grants originate from the annual block grant or from a specifically designated program competition. It is my opinion that the term "competitive" in G.L. c. 6, § 156A refers only to those applications submitted by potential subgrantees in response to an announcement of a special competition program designated as such by the Committee on Criminal Justice and that, therefore, the Proposal Review Board's authority to evaluate and approve or disapprove applications for grants is limited to those submitted in response to an announcement of a specifically designated competitive grant program. Further, it is my opinion that the Proposal Review Board performs an advisory function and does not have final decision making authority over any funding decision.

It is important to note that there is no provision in the federal statute 42 U.S.C. § 3701, *et seq.* or the federal regulations for: (a) a proposal review board; (b) the expenditure of funds designated specifically as "competitive

grants"; and, (c) the review, approval or disapproval of any so-called competitive grants by a unit designated a Proposal Review Board. Massachusetts, however, has taken it upon itself to create a Proposal Review Board to "evaluate and approve or disapprove competitive applications to the committee for funding." G.L. c. 6, § 156A. *cf.*, Executive Order No. 60, July 25, 1968 and Executive Order No. 70, March 23, 1970. The scope of the Board's authority, therefore, must be viewed with the Committee's grant making process in mind.

By statute, Law Enforcement Assistance Act (LEAA) money is distributed through five distinct grant processes. Grants are made to various states for the establishment and operation of state planning agencies. 42 U.S.C. § 3722. These are the so-called "planning grants." Second, an annual amount of money ("block grant") is allocated to each state according to their respective populations for the purpose of enabling state planning agencies to make grants to subgrantees. 42 U.S.C. § 3736 (a) (1). Third, additional sums of money may be given at the discretion of LEAA to state planning agencies, units of general local government, combinations of such units, or private nonprofit corporations. 42 U.S.C. § 3736 (a) (2). These are called "discretionary grants," the expenditure of which does not necessarily involve the state planning agency. Fourth, special grants are made directly to public agencies, institutions of higher education, or private organizations to conduct research, demonstrations, training, or educational programs designed to improve and strengthen law enforcement and criminal justice. 42. U.S.C. § 3742. Again, the expenditure of these funds does not necessarily involve the state planning agency. Finally, specific grants are made to state planning agencies for the purpose of developing and implementing programs and projects for the construction, acquisition and renovation of correctional institutions and facilities. 42 U.S.C. § 3750 (b).

As a matter of practice, the members of the Committee have determined that a *certain amount* of "block grant" money should be set aside for the funding of specific programs in designated program areas, and that all interested persons should be allowed to submit competitive bids for those funds. For example, in 1975, $335,000 was set aside for the creation and implementation of a Juvenile Delinquency Impact Program, an award eventually made to eight different sub-grantees in competition with some 42 other applicants. As discussed below, it is this type of grant which G.L. c. 6, § 156A refers to as competitive.

The process by which state planning agencies determine the manner in which monies may be granted is left largely to their discretion. 42 U.S.C. § 3733 (a) (4). The only prerequisite is that such expenditures must be consistent with the state's comprehensive plan.[1] In Massachusetts, the process for the review of grant applications and the awarding of grants is set forth in the Committee's "Briefing Book" of January 1, 1976. Generally, applications received by the Committee are first reviewed by a program specialist

[1]42 U.S.C. 3732 provides as follows:

Any State desiring to participate in the grant program under this subchapter shall establish a State planning agency as described in subchapter II of this chapter and shall within six months after approval of a planning grant under subchapter II of this chapter submit to the Administration through such State planning agency a comprehensive State plan developed pursuant to subchapter II of this chapter.

and grant manager, both of whom are members of the Committee staff.[2] When preliminary reviews are completed, the Executive Review Committee begins the process of selection and makes preliminary recommendations regarding funding. The applications are then sent to various task groups composed of members of the Committee who are experienced in a particular phase of the law enforcement or criminal justice system. The members of the various task forces review the applications and recommendations of the staff and often receive direct input from applicants. The members of the task force then decide what applications to fund and instruct the staff to prepare the committee's annual action plan. The plan is reviewed in draft form by all members of the Committee, final funding allocations are determined, and the Annual Action Plan is submitted to the Law Enforcement Assistance Administration. This final step by the Committee — its decision regarding funding allocation — is consistent with 42 U.S.C. § 3734, which provides explicitly that "the State planning agency is authorized to disburse funds to the applicant."[3]

When G.L. c. 6, § 156A is interpreted in context with G.L. c. 6, § 156 and with 42 U.S.C. § 3734, it is clear that the legislature intended members of the Proposal Review Board to have authority to review only those particular applications submitted in response to invitations to bid for competitive grant money. Further, it is clear that the Proposal Review Board does not have *final* decision making authority over the funding of *any* applications made to the Committee on Criminal Justice.

G.L. c. 6, § 156 clearly authorizes members of the Committee on Criminal Justice to review applications for funding submitted to the Committee on Criminal Justice. The Committee's "Briefing Book" similarly interprets the responsibilities of the Board and is entitled to considerable deference. See, e.g., *Udall v. Tallman*, 380 U.S. 1(1964).[4] As noted above, final decision making authority is given to the full Committee, by 42 U.S.C. § 3734, by G.L. c. 6, § 156, and by the Committee's guidelines. The language contained in § 156A must be read in the context of other statutes and regulations which treat the same subject matter. *Pereira v. New England LNG, Inc.*, 30 N.E. 2d 441 (1973), and construed so as to constitute a harmonious whole consistent with legislative purpose. *Mathewson v. Contributory Retirement Appeal Board*, 141 N.E. 2d 522 (1957). Thus, although G.L. c. 6, § 156A authorizes the Proposal Review Board to "approve or disapprove" competitive grant applications, G.L. c. 6, § 156 mandates that review of these decisions must be conducted by the full Committee, with final funding authority in that body.

[2]In addition, if the application is from a major city, it is also reviewed initially by the Criminal Justice Development Agency (CJDA) of that city. Part V, Section D(2), Commonwealth of Massachusetts Committee on Criminal Justice Briefing Book, January 1, 1976.

[3]42 U.S.C. § 3734 provides as follows:

State planning agencies shall receive applications for financial assistance from units of general local government and combinations of such units. When a State planning agency determines that such an application is in accordance with the purposes stated in section 3731 of this title and is in conformance with any existing statewide comprehensive law enforcement plan, the *State planning agency* is authorized to disburse funds to the application. (Emphasis added.)

[4]Also, I note that under the original structure of the Committee established by Governor Volpe prior to the passage of G.L. c. 6, § 156A, the Board's mandate was to "evaluate and approve or disapprove grant applications under Parts B & C of Title I of the Omnibus Crime Control & Safe Streets Act of 1968." Executive Order No. 60. The insertion by G.L. c. 6, § 156A of the modifying phrase "competitive" had the effect, therefore, of limiting the scope of the Board's activities.

Any other reading of the state statutory scheme might well be inconsistent with 42 U.S.C. § 3734 and violative of the Supremacy Clause. *Free v. Bland,* 369 U.S. 663, 666 (1962).

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 65 April 26, 1976

Bette Woody, Commissioner
Department of Environmental Management
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Ms. Woody:

You have requested my opinion regarding the authority of your Department to acquire certain land in Concord, presently occupied by a mobile home park. Your request is prompted by the following facts:

The Department of Environmental Management, as part of its Walden Pond Restoration Project, has reached an agreement with the owner of a mobile home park located at Walden Pond in Concord, to purchase his land for conservation and recreation purposes pursuant to G.L. c. 132A, § 3. The owner would condition the conveyance with a stipulation in the deed which would allow his present tenants to continue their tenancies on the premises for the rest of their lives under certain rules and regulations promulgated by the Department and recited in the deed. The Department is willing to accept such a stipulation, since it wishes to prevent present or future commercialization of this historic area.[1] Because of economic considerations, the exercise of eminent domain is not a feasible method of acquisition. The owner has agreed, however, to accept an amount substantially below the appraised value of the property and make a gift to the Commonwealth for the remainder.

On the basis of the above facts, you have specifically asked the following questions:

(1) May the Commissioner of Environmental Management pursuant to the statutory authority granted in G.L. c. 132A, §3 acquire on behalf of the Commonwealth for conservation and recreation purposes, certain lands whose public use will be deferred by the operation of life tenancies?

(2) May the Commissioner, pursuant to the authority granted in G.L. c. 132A, §2D acquire these lands where, incidental to the transaction, the Commonwealth must maintain a mobile home park to honor the tenancies specifically reserved by the seller in the deed?

[1]You note that acquisition of this property would be an integral part of the Department's program to rehabilitate and restore the Walden Pond area. The property is among the last in private ownership near the Pond.

(3) Does the broad authority of the Commissioner set forth in G.L. c. 132A permit the Commonwealth to maintain the mobile home park on a concession basis by a private party under contract to the Commonwealth?

As your question correctly assumes, the starting point for determining the legality of the proposed transaction is G.L. c. 132A, §3, which permits you to "acquire . . . by eminent domain . . . or by purchase, lease or otherwise, any lands suitable for purposes of conservation or recreation . . ." Unlike situations where the commissioner seeks to permit development or other alteration of the natural state of land already acquired,[2] *cf.* 1966 Op. Atty. Gen. p. 335 (Commissioner asks whether he could properly permit creation of ski resort), you seek to acquire already improved land and eventually return it to its natural state. I find nothing in the language of §3 which would limit its terms to those lands which can immediately be used for "purposes of conservation or recreation."[3] While the life tenancies in the present situation may take years to terminate,[4] the conservation purpose of the acquisition will not have changed nor will the nature of the land be altered. In fact, rules and regulations as to use with which the tenants must comply will be made part of the deed. Further, the aquisition is consistent with the commissioner's authority to engage in long range planning. See G.L. c.132A, §2A.

A different problem is presented, however, with that portion of the transaction considered a gift. While G.L. c.132A, §1 permits the commissioner to "accept in trust, on behalf of the Commonwealth, bequests or gifts to be used for the purpose of advancing the recreational and conservation interests and policies of the Commonwealth . . ." the approval of the governor is a necessary pre-requisite.[5] I, therefore, advise you to seek the governor's approval of that portion of the transaction which is a gift to the Commonwealth.

Your second question asks whether you can acquire lands which contain the reservation of a mobile park, pursuant to G.L. c.132A, §2D. Section 2D lists specific facilities which the commissioner can acquire, maintain, and operate; a mobile park is not included. However, §2D also permits "such other facilities as the commissioner deems necessary and desirable and consistent with the policy of the commonwealth, as set forth in section two B." Since I find that §2B permits the acquisition as a permissible exercise of your authority, it follows that §2d permits the maintenance of the mobile park.

Your final question concerns your authority to maintain the mobile park on a concession basis by private contract. It is important to make clear that

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[2] G.L. c.132A, §2D, discussed *infra*, carefully specifies the scope of permissible development and improvement.

[3] Obviously, if the land itself was not "suitable" for such purposes, either because of its nature or location or because of zoning problems, §3 would not permit acquisition.

[4] There could well be situations where the conservation purposes of §3 would be so remote in time that acquisition would amount to an abuse of discretion. However, the 65 trailer sites here are occupied by tenants ranging in age from 55 to 92.

[5] The requirement in G.L. c.132A, §1 that the council also approve the transaction was repealed by St. 1964, ch. 740, §4

I also note that St. 1956, ch 631, a special legislative enactment, contains language that might be viewed as making it unnecessary to get gubernatorial approval. That statute created the "Massachusetts Bay Circuit" which included a number of cities and towns in Metropolitan Boston, including Concord, where Walden Pond is located. St. 1956, ch. 631, §8 permits the commissioner to "accept any deed to the commonwealth containing reservation of easements, rights of way, and life estates and estates for years . . ." However, §6, which refers specifically to "grant or devise of land" requires approval of the governor.

your question does not present the abstract issue as to the commissioner's authority to establish or create a mobile park. In other words, rather than embarking upon a commercial venture, *cf.* G.L. c.132A, §§2D and 3, the Commonwealth would be fulfilling its legal obligations in a reasonable manner.[6] Your agency is permitted to "evaluate the situations presented to it on the basis of its own expertise and . . . make appropriate decisions in conformity to the legislative policy and purpose." 1966 Op. Atty. Gen. p. 335, 337.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 66 May 3, 1976

Commissioner Gregory R. Anrig
Department of Education
182 Tremont Street
Boston, Massachusetts 02111

Dear Commissioner Anrig:

You have requested my opinion as to whether certain regulations[1] adopted by the Board of Education are consistent with Chapter 622 of the Acts of 1971, G.L. c. 76, §§5 and 16.[2]

The regulations which have been questioned provide that participation on all extracurricular athletic teams, including those in the so-called "contact sports," be free from restrictions based on sex, and, that the entire curriculum offered in physical education courses be free from restrictions based on sex.[3] I find that these regulations are a valid exercise of your authority and consistent with G.L. c. 76, §§5 and 16.

[6]The language of G.L. c.132A, §2A that lands acquired by the commissioner "insofar as *practicable* be preserved in their natural state . . ." and "that no commercial activities except those essential to the quiet enjoyment of the facilities by the people shall be permitted," is not inconsistent with the result reached. It should be observed, however, such decisions must be reasonable and evaluated in the light of their particular factual context.

[1]Section 6.02: No student shall be denied the opportunity in any implied or explicit manner to participate in any extracurricular activity because of the race, color, sex, religion or national origin of the student except as provided in Section 6.07.

Section 5.04: Each school shall provide equal opportunity for physical education for all students. Goals, objectives and skill development standards, where used, shall neither be designated on the basis of sex, nor designed to have any adverse impact on members of either sex.

[2]G.L. c.76, §5: Every person shall have a right to attend the public schools of the town where he actually resides, subject to the following section. No persons shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of race, color, sex, religion or national origin.

G.L. c. 76, §16: The parent, guardian or custodian of a child refused admission to or excluded from the public schools or from the advantages, privileges and courses of study of such public schools shall on application be furnished by the school committee with a written statement of the reasons therefor, and thereafter, if the refusal to admit or exclude was unlawful, such child may recover from the town in tort, and may examine any member of the committee or any other officer of the town, upon interrogatories.

[3]It is important to note that Section 6.07 of the regulations, permits the establishment of separate teams in a particular sport, provided the teams are ". . . granted equal instruction, training, coaching, access to available facilities, equipment and opportunities to practice and compete . . ." Also, Section 3.05 provides that particular segments of a physical education program may be offered separately where necessary to protect personal privacy.

There is no doubt that the Board has the authority to issue regulations implementing G.L. c. 76, §5 and §16. See Op. Atty. Gen. No. 74/75-1 (July 2, 1974). G.L. c.15, §1(G), which sets out the scope of the Board's duties and powers, conferred administrative authority to "employ all ordinary means reasonably necessary for the full exercise of the power and for the faithful performance of the duty." *Bureau of Old Age Assistance of Natick v. Commissioner of Public Welfare*, 326 Mass. 121, 124, 93 N.E. 2d 267, 269 (1950).

The validity of the regulations must be examined in light of the statutes under which they were promulgated. Regulations, to be valid, must be within the ambit of the statute. *Commonwealth v. Diaz*, 326 Mass. 525, 527, 95 N.E. 2d 666, 668 (1950). They must not be arbitrary, but must be reasonable and necessary to achieve the purpose of the statute. *Id.* However, to be consistent with a statute, a regulation need not necessarily find support in a particular section of the statute. It is enough if they carry out the scheme or design of the chapter. *Cambridge Electric Light Company v. Department of Public Utilities*, 1973 Mass. Adv. Sh. 645, 662, 295 N.E. 2d 876, 888 (1973).

The regulations are designed to interpret the broad mandate of G.L. c. 76, §5. In fact, where a statute's coverage is broad, regulations are especially necessary and effective in interpreting its scope and application to specific situations.

> Although the usefulness of regulations should not be overrated, their importance is never greater than where, as here, an agency must interpret a legislative policy which is only broadly set out in the governing statute. *School Committee of City of Springfield v. Board of Education*, 362 Mass. 417, 442, 287 N.E. 2d 438, 455 (1972).

G.L. c. 76, §5 states that the "advantages, privileges and courses of study" of the public schools of the Commonwealth shall be free from discrimination based on "account of race, color, sex, religion and national origin." Where the language of the statute is plain it is to be interpreted in accordance with the usual and natural meaning of the words. *Commonwealth v. Thomas*, 359 Mass. 386, 387, 269 N.E. 2d 277, 278 (1971). I find that Regulation 5.04, dealing with physical education, is plainly consistent with G.L. Ch. 76, §5, which provides that no person shall be discriminated with respect to, or excluded from, *courses of study* in a public school on the basis of sex. Regulation 5.04 interprets the statute's anti-discriminatory policy specifically as applied to physical education classes,[4] and carries out the mandate of the statute that participation in a "course of study" may not be restricted on the basis of sex. There can be no doubt that Regulation 5.04 is consistent with the purpose of the statute and does not exceed its authority.

An admittedly more difficult question is presented by Regulation 6.02, since there is the threshold question as to whether extracurricular activities are among the "advantages and privileges" offered by the public schools; if not, Regulation 6.02 would exceed the statutory authority.

G.L. c. 71, §47 specifically places school-related extracurricular organizations under the control of local school committees, and designates expendi-

[4]G.L. c. 71, §3 states that physical education is a required course of study for all public school students.

tures and achievement awards related to those organizations to be for a school purpose.[5] The fiscal and supervisory powers exercised by the schools over extracurricular organizations indicates that extracurricular activities are among the activities meant to be included in the category of "advantages and privileges."[6] Further, the views of the agency charged with the responsibility of implementing the statute must be accorded due deference and taken into consideration in resolving any ambiguity. See, e.g. *Udall v. Tallman,* 380 U.S. 1 (1964). Therefore, I similarly find Regulation 6.02 to be a valid regulation implementing G.L. c. 76, §5, and not in conflict with the statute.[7]

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 67 May 14, 1976

The Honorable Robert Q. Crane
Treasurer and Receiver General
of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Treasurer Crane:

You have asked my opinion on a question of law requiring the interpretation of the provisions of Section 4 of Article LXII of the Amendments to the Massachusetts Constitution. You state that a portion of the proceeds from an imminent sale of legislatively authorized bonds will be used to repay internal advances made by the Treasurer. The advances were made after the enactment of legislation which appropriated money for specific projects and which authorized the issuance of bonds to meet that appropriation. In each instance the advances were for project costs and were made from other available funds. Based upon these facts you seek my opinion on the following question:

> May the proceeds of bonds issued pursuant to legislation authorizing such bonds for the purpose of meeting appropriations made for specified capital purposes be used to reimburse the Treasury for sums advanced for such capital purposes after the

[5]G.L. c. 71, §47 provides that: The [school] committee may supervise and control all athletic and other organizations of public school pupils and bearing the school name or organized in connection therewith . . . Expenditures by the committee for the organization . . . shall be deemed to be for a school purpose. Expenditures by the committee for making special awards to pupils who have performed meritoriously . . . shall also be deemed to be for a school purpose.

[6]Obviously, G.L. c. 76, §5 does not require a school system to provide extracurricular activities. The question presented here is whether having offered such extracurricular activities, the Board can promulgate regulations which seek to insure that these "advantages and privileges" are equally available. *Cf. Brenden v. Independent School District,* 477 F. 2d 1292 (8th Cir. 1973).

[7]Your request did not ask that I address any constitutional questions. *Cf., Board of Education v. School Committee of Springfield,* 1976 Mass. Adv. Sh. 866, 897, n. 27. It is worth noting, however, that several courts have found rules which *bar* co-educational athletic teams to violate the equal protection guaranteed by the Fourteenth Amendment to the United States Constitution. See, *Morris v. Michigan State Board of Education,* 472 F 2d 1207 (6th Cir. 1973); *Brendan v. Independent School District, supra;* and *Reed v. Nebraska School Activities Association,* 341 F. Supp. 258 (D. Neb. 1972); *Gilplin v. Kansas State High School Activities Association, Inc., 377 F. Supp. 1233 (D. Kansas 1973); Contra,* e.g., *Magell v. Avonworth Baseball Conference,* 364 F. Supp. 1212 (W.D. Pa. 1973); *Bucha v. Illinois High School Association,* 351 F. Supp. 69 (N.D. Ill. 1972). Also see generally, Note, "Sex Discrimination in High School Athletics," 57 Minn. L. Rev. 339 (1972).

> appropriation was made and the bonds were authorized, but before the bonds were issued?

For the reasons set forth below, I answer your question in the affirmative.

The power to appropriate money and to raise revenue, whether by taxation, by borrowing, or by other means, is vested by the Constitution of Massachusetts in the General Court. The Constitution of the Commonwealth contained no express restrictions on the exercise of the borrowing power until 1918. In 1918, Massachusetts joined forty-four other states which had previously adopted state constitutional amendments limiting borrowing. The Constitutional Convention rejected the "New York" model imposing a flat monetary ceiling on borrowing and opted instead to submit to the people an amendment limiting the purposes of borrowing and imposing procedural requirements on the exercise of the power. *See, generally, Debates of the Constitutional Convention 1917-1918*, Vol. III, pp. 1217 *et seq.* On November 5, 1918, the voters of the Commonwealth ratified and adopted the proposal of the convention as the sixty-second amendment. Section four of the amendment provides:

> Borrowed money shall not be expended for any other purpose than that for which it was borrowed or for the reduction or discharge of the principal of the loan.

I know of no other statutory or constitutional provision which even arguably would prohibit using borrowed money to repay internal advances made for project costs, and I am of the opinion that Section 4 does not preclude such a practice.

Constitutional provisions, like statutes, are given their common and ordinary meaning unless it appears that the framers intended to give the words and phrases used a special, technical meaning. The debate in the Constitutional Convention negates any possible inference that the word "purpose" or the phrase "that for which it was borrowed" were meant to have a technical meaning. Indeed, Section 4 of the proposed amendment was often discussed as an afterthought, with the framers indicating that it bespoke the obvious and merely formalized their understanding of sound fiscal practices. *See, e.g.*, Comments of Mr. Theller, *Debates of the Constitutional Convention 1917-1918*, Vol. III, p. 1228. The ultimate purpose of borrowing money in any given instance is to finance a particular project. That purpose is served when advances are made for project costs under the circumstances described in your letter, and Section 4 of Article LXII is not a bar to the repayment of such advances.[1]

I find further support for my conclusion in the longstanding practice of your Department to authorize repayments. Prior practice, in and of itself, will not insulate an exercise of the borrowing power from constitutional challenge, *Ayer v. Commissioner of Administration*, 340 Mass. 586 (1960). However, the consistent and long-standing administrative interpretation of a

[1]There is a line of authority suggesting that reimbursement of expenses incurred is not a legitimate basis for municipal borrowing. *Chapin v. Lincoln*, 217 Mass. 336 (1914); 4 *Op. Atty. Gen.*, 261 (1914). These authorities are not controlling in the question you present. Unlike municipalities which have only limited specifically delegated powers, the state may borrow for any non-prohibited purpose.

Constitutional provision is of significant probative value. *See, Sutherland Statutory Construction* §49.03 (4th ed. Sands, 1973).

I, therefore, advise you that you may use proceeds from the sale of bond issues to reimburse the Treasury for sums advanced for project costs under the circumstances described in your request.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 68 May 14, 1976
James M. Stone
Commissioner of Insurance
Department of Banking and Insurance
100 Cambridge Street
Boston, Massachusetts 02202

Dear Commissioner Stone:

You have requested my opinion concerning the proper construction of G.L. c.32, §4, as relating to the retirement system covering state employees. The facts upon which you base your request may be summarized as follows: A member in service has completed his term as an elected official of the Commonwealth; his term of office was governed by the Sixty-Fourth Article of Amendment to the Massachusetts Constitution and included service prior to the inauguration of his successor in the early weeks of January; the individual has now applied for retirement benefits and claims that he is entitled to a full year of creditable service for the weeks he served during his last calendar year as an elected official. You ask whether the provisions of G.L. c.32, §4(1) (a) require such a result. For the reasons set out below, I answer your question in the affirmative.

Chapter 32 of the General Laws contains an integrated series of statutes erecting a retirement and pension system for state, county and municipal employees. G.L. c.32, §4 is concerned with creditable service. Significantly it treats elected officials and other employees differently. G.L. c.32, §4(1) (a) provides in pertinent part:

> Any member in service shall . . . be credited with all services rendered by him as an employee in any governmental unit after becoming a member of the system pertaining thereto; *provided that he shall be credited with a year of creditable service for each calendar year during which he served as an elected official;* and provided, further, that in no event shall he be credited with more than one year of creditable service for all such membership service rendered during any one calendar year. (emphasis added)

Words and phrases in a statute are to be construed according to the common and approved usage of the language unless they are technical phrases having a peculiar meaning in law. *See,* G.L. c.4, §6; *School Committee of Springfield* v. *Board of Education,* 362 Mass. 417 (1972). The under-

scored language is not a technical phrase and is ambiguous only in the sense that the word "during" is susceptible to two interpretations. Webster's Third New International Dictionary (1964) defines "during" to mean either "throughout the continuance or course of" or, alternatively, "at some time in the course of".[1] The answer to your question depends upon which of these two meanings the General Court intended to import by its use of the word "during". Application of basic principles of statutory construction lead me to conclude it was the latter.

In the interpretation of statutes, no clause, sentence or word is to be deemed meaningless or superfluous. *Commonwealth* v. *Gove,* 1974 Mass. Adv. Sh. 2083; *Commonwealth* v. *Woods Hole, Martha's Vineyard and Nantucket Steamship Authority,* 352 Mass. 617 (1967). If the legislature had intended to give elected officials credit only for actual time served, then it would have been unnecessary to treat them differently from other employees. Without the special provision inserted by St. 1947, c.660, §3, elected officials would have been treated like other members in service and would receive creditable service only for that portion of the year actually served. To read the word "during" to require service throughout the entire calendar year would therefore render the proviso of which it is a part meaningless.

I find further support for my conclusion in the legislature's use of the phrase "calendar year". The terms of the Commonwealth's elected officials are governed by the Sixty-Fourth Article of Amendment to the Massachusetts Constitution. Those terms are not coextensive with the calendar year and were not coextensive with the calendar year when the provisions of Chapter 32 were made applicable to elected officials in 1947. St. 1947 c.660. The General Court was presumably aware of the fact that elective terms extended into the early weeks of the succeeding calendar year when it amended Chapter 32, §4(1) (a) by inserting the underscored proviso, *Mathewson* v. *Contributory Retirement Appeals Board,* 335 Mass. 610 (1957).

Based on the foregoing considerations, I find that the legislature intended to provide for a full year of creditable service whenever an elected state official served "at some time in the course of" a calendar year.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

[1]Similarly, some courts have interpreted the phrase "during" as meaning the entire time period, e.g., *Jennings* v. *Commonwealth,* 300 S.W. 353, 354, 222 Ky. 95, while other courts have adopted the alternative definition of the term, using such language as "in the time of", e.g., *In Re Carpenter's Estate,* 246 A 2d 72, 75, 102 N.J. Super.395 (1968); *Zigler* v. *Sprinkel,* 108 S.E. 656, 657, 131 Va. 408 (1921).

Number 69 May 19, 1976
Commissioner Robert Okin
Department of Mental Health
190 Portland Street
Boston, Massachusetts

Dear Commissioner Okin:

You have requested my opinion regarding the authority of the Department of Mental Health (DMH) to replace a single boiler at Monson State Hospital with funds appropriated for the replacement of "boilers". I find your proposed action permissible.

The legislature, pursuant to St. 1971, c. 976, provided $375,000 for "the replacement of certain boilers in the power plant" of Monson State Hospital. Apparently, the project did not go forward because stack requirements imposed by environmental agencies and inflation increased the cost, resulting in insufficient funds to complete the project as originally planned. You have requested funding in the pending capital outlay appropriation act to move two battery boilers and replace them with two new boilers, with the new stacks meeting the various environmental control requirements. You inform me, however, that there is an immediate need at Monson State Hospital to make the necessary repairs and that you could replace one boiler at this time within the previously allocated funding level. The Bureau of Building Construction (BBC) has advised you that it will not approve such renovations, in light of the legislative appropriation which uses the word "boilers", thereby implying that expenditures must be for more than one boiler to be within the legislative mandate. BBC refers to a previously issued opinion of the Attorney General, 1965 Op. Atty. Gen. p. 145 as support for its position.

The Opinion of the Attorney General, upon which BBC relies, addressed the question of whether $34,000,000 appropriated for the construction of three buildings in the Government Center could be expended for only as many of the buildings as might be built with such sum. The Attorney General concluded that because of "[t]he clear intent" of the legislature to require all three buildings to be constructed (each building to house a distinct group of personnel), the funds must be used to build all three buildings, even if on "a much more modest, though adequate scale" than originally envisioned.

In the present case, however, the legislative intent was clearly to provide adequate heat at Monson State Hospital through the replacement of the boilers. Both boilers perform or fail to perform the same function (heating the building), and replacing one boiler better carries out the legislative intent than replacing no boiler at all.

Finally, permitting DMH to use its appropriated funds to replace just one boiler is consistent with the principles of statutory interpretation set forth in G.L. c. 4,§6,cl.4, which state:

> In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the lawmaking body or repugnant to

the context of the same statute: . . . [w]ords importing the plural number may include the singular . . .

I, therefore, find that in this case it would be lawful for you to use the 1971 appropriation to replace a single boiler.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 70 May 21, 1976

Mr. Wallace H. Kountze
Personnel Administrator
One Ashburton Place
Boston, Massachusetts 02108

Dear Mr. Kountze:

You have asked my opinion on the following questions relative to G.L. c. 31, §46I,[1] a statute which governs the re-employment of individuals laid off from work within the civil service system:

1. If an individual is laid off from employment with the Commonwealth, is that individual eligible to go on a re-employment list for positions in any municipality?[2]

2. In certifying individuals from the re-employment list is "the judgment of the administrator" (G.L. c. 31, §46I) restricted to qualifications previously demonstrated in accordance with civil service procedures, that is, a civil service examination, or may the administrator's judgment be extended to possible qualifications not previously related to the individual's civil service history?[3]

3. If the answer to question two is that the administrator's judgment may be extended to possible qualifications not previously related to the individual's civil service history, would a person laid off from a labor service job, who may be personally generally qualified, be eligible for certification from the

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[1]G.L. c. 31, §46I provides, in part:

Whenever a person is separated from the official or labor service for lay-off due to lack of work or lack of money or for abolition of position, his name shall be placed by the administrator on the re-employment list, and if a person is separated from such service because of resignation on account of illness, his name shall be placed thereon upon his request in writing made within two years from the date of such separation. The name of any person so placed on the re-employment list shall remain thereon until he is appointed to a position after certification from such list or reinstated to a civil service position, but in no event for longer than two years. This section shall not apply to persons originally employed on requisition for temporary service or to provisional appointees. Thereafter, on requisition to fill any position which, *in the judgment of the administrator*, can be filled from such re-employment list the administrator before certifying from the regular list, shall certify from such re-employment list, in accordance with the rules relative to certification, the names of persons then standing thereon in the order of the dates of their original appointment. (Emphasis supplied).

[2]You ask, for example, whether a state employee could go on a re-employment list for a position in the City of Boston (or any other city or town)?

[3]You ask, for example, whether a person whose civil service record was solely an appointment as a Junior Clerk and Stenographer, a promotion to Senior Clerk and Stenographer and again promotion to Principal Clerk who was laid off from the last position, can be certified from the re-employment list as an Accountant, Junior Civil Engineer, or Public Health Nurse because that individual happened to possess qualifications for one of these positions? Or conversely should a person who has been laid off from one of the three latter positions, who might have the qualifications of a stenographer, be certified for a position of Junior Clerk and Stenographer?

re-employment list to an official service position even though the person had never taken a competitive examination?

4. If the answer to question two is that the personal qualifications of the individual are the determining factor and past civil service history is not a necessary part of such determination, does Section 46I require that the administrator review and analyze the personal qualifications of each individual on the re-employment list before certifying from the regular list?[4]

With respect to your first question, I find no restriction which would prevent a state employee from going on a re-employment list for positions in cities or towns, provided that, as required by G.L. c. 31, §46I, the appointment is appropriate in your judgment. Section 46I at no point distinguishes between municipal and state positions.

Your second question concerns the standard to be used in certifying individuals. G.L. c. 31, §46I provides that certification from the re-employment list be made where appropriate "in the judgment of the administrator". No further standard is set forth in §46I.

This provision is in direct contrast to the other provisions of Chapter 31 relating to the certification of individuals for appointment. Those other provisions limit the discretion of the administrator in filling civil service positions or in promotions by requiring prospective appointees to pass civil service examinations.[5] It would, thus, appear that §46I is designed to provide the administrator with greater flexibility in certification than is normally provided in c. 31 due to the circumstances under which the employment is terminated, i.e., through no fault of the tenured employee. On the other hand, the administrator's responsibility in §46I is consistent with other provisions of Chapter 31 where the legislature has delegated to the administrator the authority to determine eligibility requirements for various types of civil service appointments. For example, G.L. c. 31, §2A(e) provides that the personnel administrator should

> *determine and pass upon qualifications of applicants;* and hold examinations for the purpose of establishing eligible lists of persons for appointment or promotion to positions in the official service. (Emphasis supplied.)

G.L. c. 31, §15 allows the administrator to authorize *provisional* appointments without examinations if the administrator determines that the person proposed for provisional appointment meets the qualifications and requirements necessary to perform the duties of the position in question.

Similarly, G.L. c. 31, §15B(1) allows the administrator to determine which civil service employees are qualified to take competitive promotional examinations by placing on the administrator the responsibility for determining which class or service groups "contain positions having duties, qualifications, and other significant characteristics similar or functionally related to those of the position for which the [promotional] examination is to be held." See, also, G.L. c. 31, §15B(2).

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[4]You note it is highly conceivable that a person who ostensibly has the personal qualifications, if one only looks at a resume of training, education and experience, could not pass the civil service examination for the position being filled.

[5]See, for example, G.L. c. 31, §15 and the requirements for examinations for appointment and promotion.

My answer to question two, therefore, is that the administrator is not restricted to qualifications previously demonstrated in accordance with civil service procedures, (i.e., a civil examination) but may consider qualifications not previously related to the individual's past civil service history. It is, in other words, within your discretion to make any reasonable determinations of eligibility for certification under §46I. This discretion is, of course, not without limitations; you must fashion consistent, reasonable guidelines which do not undermine the intent of the civil service system.[6] Your third and fourth questions, which I will treat together, raise the issue of what type of guidelines would be appropriate.

In fashioning such guidelines, provisions found elsewhere in Chapter 31 are useful in determining the outer limits of your discretion. These sections emphasize an individual's experience, education, and training (G.L. c. 31, §§8(c) and 15B(2)), and the skills and abilities necessary to perform the duties of the vacant office position (G.L. c. 31, §15). Under appropriate circumstances, you could certify an individual from the re-employment list to a position in a different class or unit from that in which he was originally employed and for which he has not taken a civil service examination. However, in order to do so, you must be satisfied that there is sufficient connection between the individual's qualifications and the requirements for the vacant position so that your decision does not amount to an abuse of discretion.[7]

For example, (to refer to the example posed in question two) a principal clerk who was laid off from that position could only be certified from the re-employment list as an accountant, junior civil engineer or public health nurse if you were persuaded that the individual possesses the qualifications to successfully function in the new capacity. Similarly, it is unlikely, although not impossible, that an individual who was terminated from a labor service job would be qualified for appointment from the re-employment list to an official service position. The fundamental differences between the labor and official service would likely result in an abuse of discretion if former labor service employees were indiscriminately certified to fill official service vacancies.

My reading of G.L. c. 31, §46I, which grants substantial discretion to the administrator in certifying from the re-employment list, is based upon the wording of the statute itself. Section 46I directs the administrator to fill *any* position from the re-employment list when such action is appropriate in his judgment. While it would no doubt be useful for you to have more precise guidelines to assist you in making your judgment, none are provided by the statute. Nor can an Attorney General's Opinion supply precision where the legislature has chosen to commit such decisions to your judgment and expertise.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

[6]The requirement that an individual be "generally qualified", which I previously found to implicit in Section 46I (1974-75 Op. Atty. Gen. p. _____, No. 57, April 25, 1975), is a shorthand way of stating the same concept.

[7]The certification process set forth in Section 46I requires, to some extent, an individualized decision by the administrator. You are permitted, however, to develop standards which would assist you and make the administrative process of reviewing qualifications less burdensome.

Number 71 May 24, 1976

Gregory R. Anrig
Commissioner of Education
182 Tremont Street
Boston, Massachusetts 02111

Dear Commissioner Anrig:

You have requested my opinion concerning the proper construction of the "grandfather clause" of Chapter 766 of the Acts of 1972, the Commonwealth's special education law.[1] You state that since chapter 766 went into effect on September 1, 1974, a number of unresolved questions concerning the scope and meaning of the "grandfather clause" have arisen. Accordingly, you pose the following two questions:

1. Does the phrase "with his tuition paid by the commonwealth" in St. 1972, c. 766, §18 make this grandfather clause applicable to children placed in special education programs as of September 1, 1974 by *any* agency of the Commonwealth?
2. Does St. 1972, c. 766, §18 impose responsibility on a state agency for a child's continuing special education placement as long as the child was a client of the agency, and had his special education program approved by that agency prior to September 1, 1974, even if the special education program for which the agency contracted to pay did not actually begin until September 3, 1974?

I answer both your questions in the affirmative for the reasons that follow.

Initially, it is useful to summarize briefly the factual context within which these questions arise. Specifically, you mention that several state agencies[2] and local school committees have disagreed over the proper allocation of responsibility for the cost of continuing special education programs of children with special needs who, at the time Chapter 766 went into effect, were in such programs with their tuition being paid for by the state agency. Apparently, the state agencies concerned have contended that §18[3] of Chapter 766 only refers to children who are enrolled in programs paid for by the Department of Education; based on this reading, they argue that the local school committees are responsible for the total costs of continuing special

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[1]These sections appear as §§16-18 of St. 1972, c. 766, and provide as follows:

Section 16. A child who is in a special education program as of the effective date of this act (September 1, 1974) shall be presumed to be appropriately assigned to said program until an evaluation pursuant to the provisions of section three of chapter seventy-one B of the General Laws, inserted by section eleven of this act, indicates that another program would benefit said child more.

Section 17. No child with special needs in a special education program on the effective date of this act shall be removed from said program he is in without the written consent of the parents, guardians, or persons with custody of said child.

Section 18. A school committee shall not be responsible for more than the average per pupil cost for pupils of comparable age within the respective city, town or school district as its share of the cost of continuing placement for those children with special needs enrolled in an institution with his tuition paid by the commonwealth as of the effective date of this act.

[2]You refer specifically to the Massachusetts Rehabilitation Commission. I understand, however, that the same questions have been raised by the Department of Public Welfare and other agencies as well.

[3]As you state in your letter, the specific section of the "grandfather clause" at issue in this dispute is §18. It must be assumed, therefore, that the children whose programs are under question were in "special education programs" on the effective date of the Act within the meaning of §17, so that their programs may not be terminated without their parents' or guardians' consent.

education programs for children who had been placed in the programs as of September 1, 1974, by any other state agency. The school committees, on the other hand, take the position that §18 applies to continuing special education programs which had been paid for by *any* state agency prior to the effective date of Chapter 766; they argue that with respect to all such programs their financial responsibility is limited to the average per pupil cost.

Turning to your first question, I find nothing in the language of §18 to support the contention that its terms apply solely to the Department of Education. The section refers expressly to special education programs which have previously been paid for by *the Commonwealth*, without any mention of the Department of Education or any particular state agency. If the legislature had intended §18 to apply specifically to the Department of Education, it could and would have so stated. *See, e.g.*, G.L. c. 71B, §§2, 3, 4, 6, 7, 8, 9, 11, 12, 13, all of which make express reference to the "department".[4] Moreover, in the last two sections cited, the legislature has referred to both the "department" and the "commonwealth" as plainly separate entities.

General rules of statutory construction require that a term appearing in different portions of a statute be given the same meaning and that, to the greatest extent possible, each word be given proper effect. *E.g., Bolster v. Commissioner of Corporations & Taxation,* 319 Mass. 81, 84 (1946). A reading of §§12 and 13 of c. 71B makes obvious that the legislature has not employed the words "commonwealth" and "department" interchangeably. Where, as in §18, "commonwealth" appears alone and without special definition, it must be construed according to its "ordinary and approved usage . . . when applied to the subject matter of the act . . . ." *Franki Foundation v. State Tax Commission,* 361 Mass. 614, 617 (1972); *see Bolster v. Commissioner of Corporations & Taxation, supra* at 84-85. Following these principles, I am of the opinion that "commonwealth" as used in §18 of Chapter 766 refers to the Commonwealth acting as an entity or through *any* of its agencies, departments, commissions, etc. Accordingly, with respect to a "child with special needs" placed in a special education program as of September 1, 1974, by and at the expense of any state agency, the school committee of the city or town where the child resides is only responsible for paying an annual amount equal to its average per pupil cost as long as the child remains in the program; the agency which originally placed the child remains responsible for program costs in excess of this amount.

While I believe the language of §18 is sufficiently unambiguous as to require, without additional analysis, the construction I have given it, *see Chouinard, Petitioner,* 358 Mass. 780, 782 (1971), I note that it is also the only construction which will make the "grandfather clause" as a whole "an effective piece of legislation in harmony with common sense and sound judgment." *Tilton v. City of Haverhill,* 311 Mass. 571, 577-78 (1972). *Accord, Mass Mut. Life Ins. Co. v. Commissioner of Corporations & Taxation,* Mass. Adv. Sh. (1973) 863.

[4]The "Department" refers to the Department of Education for purposes of Chapter 766. *See* G.L. c. 71B, §1, inserted by St. 1972, c. 766, §11.

Under the financial scheme contemplated by Chapter 766, local school committees are financially responsible only for that portion of each special education program equal to their average per pupil cost for pupils of comparable age; the excess is to be reimbursed by the Commonwealth. This method of allocating costs applies to all special education programs commenced after the effective date of Chapter 766. *See e.g.*, G.L. c. 71B, §§10, 12, 13.[5] In addition, no one appears to dispute that under §18 of Chapter 766, this allocation formula also applies to programs in place on the effective date of the statute which were paid for by the Department of Education. Under the construction of §18 suggested by the agencies you mention, however, the same financial scheme would not govern programs originating before the effective date of Chapter 766 and paid for by such agencies. Rather, the local school committees would be wholly responsible for their continuing costs. No reason is given for treating these programs in a manner different than all others covered by Chapter 766. I hesitate to ascribe to the legislature an intent to reach such an anomalous result absent explicit statutory language that would require me to do so. The more reasonable, common sense approach is to read §18 as applying to the Commonwealth and any of its agencies.

Your second question refers to the situaton where a state agency approved a special education program prior to September 1, 1974, but the program did not actually begin until September 3, 1974.

In response to this question, I again rely on the rule of statutory construction mandating that a statute be interpreted if possible in harmony with common sense and reason. Pursuant to this rule, it is my opinion that §18 of Chapter 766 imposes responsibility on a state agency for a child's continuing special education placement in an institution as long as the child was a client of the agency and had his program approved and contracted for by the agency prior to September 3rd.

The word "enroll" is ordinarily defined as to "register, or enter." Webster's Third New International Dictionary, p. 755 (1964). Under this definition, it is clear that a student may be effectively "enrolled in an educational program before instruction under the program has begun. *Wirth v. Corning,* 75 F. Supp. 817 (D.D.C. 1948). *Cf., Long v. Dick*, 87 Ariz. 25, 347 F.2d 581, 582 (1959). In the situation you describe, the state agency had approved the special education program and contracted to pay for it as of September 1, 1974. (I assume, also, that the institution had accepted the child for the program by that date.) Thus, all the critical steps for "enrollment" had been accomplished before the effective date of the Act. In these circumstances it is only reasonable to conclude that the child in question was "enrolled in an institution with his tuition paid by the commonwealth as of the effective date of [Chapter 766]." Accordingly, as I have discussed above, under §18 the

[5]While G.L. c. 71B, §§10 and 12 authorize the Department of Education, in its discretion, to order school committees to bear the full cost of the special education placements described in those sections, the Department's regulations provide for reimbursement to school committees of all costs exceeding the average per pupil expenditure. Chapter 766 Regulations, §§504.4 and 504.5.

state agency who had placed the child is responsible for the cost of the continuing placement in excess of the portion paid for by the appropriate school committee.[6]

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 72 June 15, 1976

Gregory R. Anrig
Commissioner of Education
Department of Education
182 Tremont Street
Boston, Massachusetts 02111

Dear Commissoner Anrig:

You have requested my opinion on the following two questions which concern transportation of nonpublic school students:

1. Is G.L. c.76, §1, paragraph 2, entitling private school pupils to the same rights and privileges as to transportation to and from school as are provided by law for public school pupils, constitutional under Amend. Art. 18 of the Massachusetts Constitution?
2. If it is, under what circumstances does the law require a city or town to pay for the transportation of students attending private or parochial schools in other communities?

I. *The Constitutionality of G.L. c.76,* §1

G.L. c.76, §1 provides in pertinent part:

> For the purposes of this section, school committees shall approve a private school when satisfied that the instruction in all the studies required by law equals in thoroughness and efficiency, and in the progress made therein, that in the public schools in the same town: but shall not withhold such approval on account of religious teaching, and, in order to protect children from the hazards of traffic and promote their safety, cities and towns may appropriate money for conveying pupils to and from schools approved under this section.
>
> Pupils who, in the fulfillment of the compulsory attendance requirements of this section, attend private schools of elementary and high school grade so approved shall be entitled to the same rights and privileges as to transportation to and from school as

[6]To reach the opposite conclusion based on the fact that the program at issue did not actually start to operate until September 3, 1974, would unnecessarily exalt form over substance. This conclusion gains force from fact that September 1, 1974 fell on a Sunday and September 2 was Labor day, — both holidays. Presumably many school programs operating for the 1974-75 academic year did not begin until Tuesday, September 3.

> are provided by law for pupils of public schools and shall not be denied such transportation because their attendance is in a school which is conducted under religious auspices or includes religious instruction in its curriculum, nor because pupils of the public schools in a particular city or town are not actually receiving such transportation.

The United States Supreme Court has ruled that the First Amendment of the United States Constitution does not prohibit a state from providing transportation to students who attend private or parochial schools. *Everson* v. *Board of Education,* 330 U.S. 1 (1947); *see also, Meek* v. *Pittenger,* 421 U.S. 349, 364 (1975); *Board of Education* v. *Allen,* 392 U.S. 236, 242 (1968). You have asked, however, whether Article XVIII[1] of the Amendments to the Constitution of the Commonwealth (the Anti-Aid Amendment) prohibits a municipality from providing transportation to students who attend private or parochial schools. For the reasons discussed below, I have concluded that G.L. c. 76, §1, which authorizes such transportation, on its face does not violate Article XVIII.

The Supremacy Clause of the Federal Constitution requires me to read Article XVIII in harmony with the Free Exercise Clause of the First Amendment to the Federal Constitution. Decisions of the Supreme Court interpreting the Free Exercise Clause have emphasized the requirement of neutrality of state law toward the exercise of religion. *See, e.g., Sherbert* v. *Verner,* 374 U.S. 398, 402-03 (1963). Article XVIII, therefore, must operate neutrally, without hostility toward religious interests.

In a recent opinion, 1974-75 Op. Atty. Gen. No. 65 (June 12, 1975), I concluded that a construction of Article XVIII which would prohibit a textbook loan program similar to those sustained by the Supreme Court would raise a danger that Article XVIII violated the Free Exercise Clause of the Federal Constitution. To avoid this constitutional doubt, I read the state and federal constitutional law on this issue to be in harmony. Because the circumstances of the instant opinion request are similar, I reach the same result here, *cf., Everson* v. *Board of Education,* 330 U.S. 1, 16 (1947), and conclude that Article XVIII should not be read to prohibit the transportation of nonpublic school students to and from school.[2]

Neither the opinions of the Supreme Judicial Court nor of the Attorney General dictate a contrary conclusion. In fact, over thirty years ago, the Attorney General concluded that a municipality may furnish transportation to parochial and public school students without violating Article XVIII. 1935-36 Op. Atty. Gen. p. 40. The proposed statute was considered to be

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[1]The Eighteenth Article of Amendment was superseded by the Forty-sixth Article, which in turn was amended by the One Hundred and Third Article. For convenience, I have throughout this opinion adopted your use of the term "Article XVIII" as a short-hand reference to the end product of these various amendments.

[2]The United States Supreme Court has applied a three-part test to determine whether various forms of assistance violate the Establishment Clause. This test was stated in *Week* v. *Pettinger, supra,* at 1760:

First, the statute must have a secular legislative purpose . . . Second, it must have a "primary effect" that neither advances nor inhibits religion . . . Third, the statute and its administration must avoid excessive government entanglement with religion.

Although in this opinion I have read federal and state constitutional law to be in harmony, it should be noted that there may be circumstances where the more specific language of Article XVIII, see *Opinion of the Justices,* 357 Mass. 836, 841 (1970), would bar aid to private institutions which would be permissible under the First Amendment and still not create a Supremacy Clause problem.

consistent with Article XVIII because it would confer a benefit on the students, as distinguished from the school itself. That opinion continues to be valid, and its rationale — the so-called "child benefit" theory — has sustained other benefits to non-public school students. *E.g.,* 1950-51 Op. Atty. Gen., p. 38 (school lunch program); 1965-66 Op. Atty. Gen., p. 370 (guidance counselors); 1975 Op. Atty. Gen. No. 65 (textbooks).

The Supreme Judicial Court has not ruled on the precise question of the constitutionality under Article XVIII of furnishing transportation to non-public school students.[3] In their Opinions, however, the Justices have given no reason to suggest that they would reject the child benefit theory of aid to nonpublic school students.

In *Opinon of the Justices,* 357 Mass. 836 (1970), the Justices concluded that proposed legislation which would allow the Commonwealth to purchase secular educational services from nonpublic schools would violate Article XVIII. The Justices stated that reimbursement of nonpublic schools under the proposed statute would be such "substantial assistance" as to constitute "aiding" as that term is used in Article XVIII. The Justices reached a similar conclusion in *Opinion of the Justices,* 357 Mass. 846 (1970), with respect to proposed legislation which would have channelled public funds to private schools by means of tuition subsidies to nonpublic school students. Although the form of aid was indirect, the Justices concluded that it would have the same practical effect as the direct purchase of secular educational services.

It is apparent that the purpose of the proposed legislation considered in each of these Opinions was to assist private schools, and that the proposed legislation would not have been sustained under the child benefit theory.[4] Here, however, I find that G.L. c. 76, §1 is not an attempt to provide direct or indirect assistance to private institutions, but rather a proper means of promoting the legitimate public interest in the conservation of the health and protection of the safety of school chilren. Accordingly, I conclude that G.L. c. 76, §1 does not on its face violate Article XVIII of the Amendments to the Constitution of the Commonwealth.

II. *The 1971 Amendment to G.L. c. 76,* §1

The last clause of G.L. c. 76, §1, ¶2, which provides "nor because pupils of the public schools in a particular city or town are not actually receiving such transportation," was added by Chapter 875 of the Acts of 1971. It is apparently this amendment which has prompted your second question regarding

[3]In *Quinn* v. *School Committee of Plymouth,* 332 Mass. 410 (1955), the court ruled that the school committee lacked standing to question the constitutionality of G.L. c. 76, §1. Courts in other jurisdictions have both upheld and invalidated transportation programs, on the basis of particular provisions of their state constitutions. *E.g., Bowker* v. *Baker,* 73 Cal. App. 2d 653, 167 P.2d 256 (Dist. Ct. App. 1946); *Snyder* v. *Town of Newton,* 147 Conn. 374, 161 A.2d 770 (1960); *Board of Education* v. *Bakalis,* 54 Ill.2d 448, 299 N.E.2d 737 (1973); *Adams* v. *County Commissioners,* 180 Md. 550, 26 A.2d 377 (1942); *Alexander* v. *Bartlett,* 14 Mich. App. 177, 165 N.W.2d 445 (1968); *American United, Inc.* v. *Independent School District No. 622,* 288 Minn. 196, 179 N.W.2d 146 (1970); *Rhoades* v. *School District,* 424 Pa. 202, 226 A.2d 53 (1967). For decisions invalidating transportation programs, see, *e.g., Matthews* v. *Quinton,* 362 P.2d 932 (Alaska 1961); *Spears* v. *Honda,* 51 Hawaii 1, 449 P.2d 130 (1968); *Epeldi* v. *Engelking,* 94 Idaho 390, 488 P.2d 860 (1971); *Judd* v. *Board of Education,* 278 N.E. 200, 15 N.E.2d 576 (1938); *Board of Education* v. *Antone,* 384 P.2d 911 (Okla 1963); *Visser* v. *Nooksack Valley School District No. 506,* 33 Wash.2d 699, 207 P.2d 198 (1949); *State ex rel. Reynolds* v. *Nusbaum,* 17 Wisc.2d 148, 115 N.W.2d 761 (1962). As the Justices of our Supreme Judicial Court have stated, "[o]pinions of other states, with different constitutional provisions, are not controlling." *Opinion of the Justices,* 35 Mass. 836, 845 (1970).

[4]*Cf., Opinion of the Justices,* 356 Mass. 775, 800 (196p9), in which the Justices stated that the "provision of facilities in aid of a proper public purpose will not be rendered unconstitutional simply because individuals or private entities, as such, incidentally may profit." *See also Opinion of the Justices,* 354 Mass. 779 (1968).

the obligation of municipalities to furnish transportation to students attending private or parochial schools.

In *Quinn* v. *School Committee of Plymouth,* 332 Mass. 410 (1955), the Supreme Judicial Court construed G.L. c. 76, §1 as it then stood. The Court stated:

> We think that by its enactment the Legislature intended to make available to children in private schools transportation to the same extent as a school committee within its statutory power should make transportation available to children in public schools. . . . The question is not what the committees can be made to do. The requirement imposed is that there by no discrimination against private school children in what the committee in its discretion decides to do. *Id.* at 412.

The Court ordered the school committee to furnish transportation to nonpublic school students "to the same extent that transportation is provided" to pubic school students. *Id.* at 414. (Emphasis added.)

Subsequent to the *Quinn* decision, an opinion of the Attorney General concluded that a town whose high school students are transported to a regional district high school in another town, but it or the district, must provide similar transportation to pupils attending private high schools outside the town. 1960-61 Op. Atty. Gen., p. 127.

A second Attorney General's opinion on the subject of transportation of private school students concluded that the furnishing by a town of transportation of a pupil to a private school in another town is required only when similar transportation is being furnished to pupils in the public schools in the same grade. 1961-62 Op. Atty. Gen., p. 99.

A third Attorney General's opinion advised that the Department of Education was not authorized by G.L. c. 71, §7A to cause reimbursement to a municipality for expenses incurred in the transportation of private high school students to a school outside the town, if the town did not transport any public high school students to schools outside the town. 1961-62 Op. Atty. Gen., p. 85.

Finally, a fourth opinion concluded that, since the town of Berkeley transported all of its public high school students to a school in one adjoining municipality, it must also provide transportation to six (6) private high school students who attended school in a second adjoining municipality. That opinion also indicated that a school committee is obligated to provide transportation to private school pupils even though the cost per capita may be greater for the private school pupils. 1965-66 Op. Atty. Gen., p. 74. Each of these opinions was based upon *Quinn v. School Committee of Plymouth, supra;* each opinion read that case as requiring transportation of private school students "to the extent that transportation is provided" (*in fact*) to public school students in the same grades.

Chapter 875 of the Acts of 1971 eliminates the requirement that transportation be in fact provided to public school students before it can be provided to nonpublic school students. It is apparent, therefore, that this amendment was adopted to overrule the *Quinn* case or, at least, the construction of that

case adopted by the Attorney General. Consequently, it becomes necessary to reconsider the present effect of the *Quinn* decision.

In *Quinn*, the school committee of Plymouth provided transportation for students who attended public schools in Plymouth as follows: (1) grades one through six if the distance between the homes and schools exceeded one mile; (2) grades seven through twelve if the distance between the homes and schools exceeded one and one quarter miles. Some of the petitioners' children attended grades one and two in parochial schools in Plymouth; all of these students lived more than one mile from their school. The school committee did not provide transportation for these students, but the Court ordered it to do so.

The school committee also transported four elementary school pupils living twenty or more miles from the center of Plymouth to a public school in the adjoining town of Bourne. Some of the petitioners' children attended grades three through six in a parochial school in the adjoining town of Kingston. The committee provided no transportation for these students. The petitioners asked the Court to order the committee to provide transportation to nonpublic school students "whenever said children meet the criteria of distance as established from time to time by the respondents for all the school children of Plymouth." The Court ordered the committee "to provide transportation to the Sacred Heart School in Kingston for pupils in grades III through IV to the extent that transportation is provided by the committee for elementary school pupils in the public school in Bourne." *Id.* at 414.

The school committee had contended that "the same rights and privileges as to transportation to and from school as are provided by law for pupils of public schools" (G.L. c. 76, §1), meant only those rights and privileges conferred by *statutes* of the Commonwealth[5] and did not include rights or privileges granted by the committee's regulations or decisions to public school students. The Court expressly rejected this contention. *Id.* at 412. Instead, the Court ruled that

> [t]he Legislature intended to make available to children in private schools transportation to the same extent as a school committee within its statutory powers *should* make transportation available to children in public schools . . . . The question is not what the committee can be made to do. The requirement imposed is that there be no discrimination against private school children in what the committee *in its discretion* decides to do. *Id.* (Emphasis added.)

Construing Chapter 875 in light of the *Quinn* decision and the Opinions of the Attorney General noted above, I believe that by this amendment, the Legislature intended to codify the statement of the Court that a school committee furnish transportation to nonpublic school students when circumstances are such that the committee *should* furnish transportation to similarly situated public school students. Further, the Legislature intended to set aside the Attorney General's interpretation of the *Quinn* decision which had read the Court's holding to mean that a committee is required to provide transportation to nonpublic school students to the extent that trans-

[5]Specifically, the right, under G.L. c. 71, §68, to appeal to the Department of Education in certain circumstances.

portation is in fact provided to public school students.

As so interpreted, Chapter 875 adds to G.L. c. 76, §1 in its pristine form no additional requirement of furnishing transportation to nonpublic school students. Rather, it excludes from the decision whether to furnish transportation to nonpublic school students consideration of the fact that, because there are no similarly situated public school students, the transportation requested is not in fact being provided to public school students.

I conclude, therefore, that G.L. c. 76, §1 requires a municipality to provide transportation to nonpublic school students when the circumstances are such that the municipality would provide transportation to similarly situated public school students, either because it is required by law, or by its own regulations or practices to do so, or because in the exercise of its sound discretion, considering among other things the health and safety of the children, it would choose to do so.

This interpretation may best be illustrated by the following examples:[6]

(1) if there are similarly situated public and nonpublic school students and if the public school students are provided with transportation, transportation to the same extent must be provided to nonpublic school students; (2) if there are similarly situated public and nonpublic school students and if the public school students are not provided with transportation, transportation need not be provided to the nonpublic school students;[7] (3) if the public and nonpublic school students are not similarly situated but a law, regulation, or practice would require transportation of public school students if they were in the same circumstances as the nonpublic school students, transportation must be provided to the nonpublic school students to the same extent that it would be provided if they were public school students; and (4) if the public and nonpublic school students are not similarly situated and no law, regulation, or practice would require transportation of public school students if they were in the same circumstances as the nonpublic school students, a school committee must exercise its discretion in deciding whether to furnish transportation to the nonpublic school students without consideration of the fact that the nonpublic school includes religious instruction, or the fact that no public school students are actually receiving the transportation contemplated for the nonpublic school students.

These examples illustrate the intent of G.L. c. 76, §1, ¶2 which is, as the Court stated in *Quinn,* that in furnishing transportation to students, "there be no discrimination against private school children."

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

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[6]The memorandum attached to your request raised additional hypothetical questions to which I decline to respond. *Cf.* 1 Atty. Gen. Op. 273, 275 (1895). The examples above, however, should provide you with sufficient guidance on this matter.

[7]Chapter 875 may be read as requiring an independent determination of whether to provide transportation to nonpublic school students under these circumstances. I have, however, rejected this interpretation. The thrust of G.L. c. 76, §1 is to put nonpublic school students in the same position regarding transportation as public school students. I do not believe that, in enacting Chapter 875, the Legislature intended to expand the scope of G.L. c. 76, §1 as originally enacted, but rather, intended to overrule the narrow interpretation of the statute adopted by this office in opinions following the *Quinn* decision.

I hasten to add, however, that the term "similarly situated" is not necessarily limited to distance from a child's home to school. Thus, if a public and a nonpublic school were in close proximity to each other, but only the nonpublic school were surrounded by extremely hazardous roads, the students attending these two schools would not necessarily be similarly situated for purposes of providing transportation.

Number 73 June 14, 1976

Honorable Owen L. Clarke
Commissioner of Corporations and Taxation
Leverett Saltonstall Building
100 Cambridge Street
Boston, MA 02204

Dear Commissioner Clarke:

You have requested my opinion by letter dated May 21, 1976, as to whether the person currently acting as Treasurer of Plymouth County has been duly qualified to perform the acts of that office, including the borrowing of funds on behalf of the County. Specifically, you have asked the following questions:

1. Did Mr. John F. McLellan's appointment as Assistant County Treasurer continue beyond the death of the County Treasurer who appointed him?

2. Absent any further action by the County Commissioners, did Mr. McLellan as Assistant County Treasurer become the Acting County Treasurer upon the death of the duly elected County Treasurer?

3. May the Director of Accounts properly certify, under G.L. c.35, sec. 39B, that Mr. McLellan is the duly qualified County Treasurer of Plymouth County?

I shall address these questions in order.

I. Continuation of the Assistant Treasurer in Office.

The office of county treasurer, its qualifications, and its term, are established by G.L. c.35, §1. Elections for that office are provided by G.L. c.35, §1, and c.54, §§ 62 and 160. The county treasurer may appoint an assistant treasurer under G.L. c.35, §2, which provides, in pertinent part, as follows:

> In any county, except Suffolk and Nantucket, the county treasurer may appoint an assistant in his office, who has served therein for at least one year, as assistant treasurer, removable at his pleasure. . . .

By the express language of the statute, the assistant treasurer, once appointed by a county treasurer, continues to serve in that position until removed by the county treasurer. However, by common law rules, the tenure of office of the assistant treasurer cannot last beyond that of the official who appointed him. *Cieri* v. *Commissioner of Insurance,* 343 Mass. 181, 184 (1961). The one limited exception to this rule does permit the assistant treasurer to remain in office as a "holdover" until his own successor is appointed and qualified. *Howard* v. *State Board of Retirement,* 325 Mass. 575, 579 (1931). There is no provision in the statute to prevent the assistant treasurer from resigning the position, prior to removal by the treasurer, or from ceasing to perform the duties of that position. See, *Russell* v. *Worcester,* 323 Mass. 717, 719 (1949).

In the situation about which you have requested my opinion, Lawrence F. Marden was elected County Treasurer of Plymouth County for a term expiring on December 31, 1978. During his term of office, he duly appointed John F. McLellan to be Assistant Treasurer. On February 1, 1976, County Treasurer Marden died. In view of the language of G.L. c.35, §2, and the

common law rule, *supra,* Mr. McLellan remained Assistant Treasurer as a "holdover" after Mr. Marden's death, since he had not been removed "at the pleasure" of a subsequent County Treasurer. However, on the basis of other facts you have presented, it appears that after the death of Mr. Marden, Mr. McLellan ceased acting as Assistant Treasurer and began performing the duties of Treasurer that were assigned to him by the County Commissioners, as explained below.

II. The Present Acting County Treasurer.

G.L. c.35, §2, provides for an Assistant Treasurer to perform the duties of the County Treasurer when the latter is unable to do so. This statute states, in pertinent part, as follows:

> . . . If the treasurer is unable to act, the assistant treasurer shall perform his duties. If both the treasurer and the assistant treasurer are unable to act, the county commissioners may appoint a temporary treasurer, who shall hold office until the treasurer or assistant treasurer is able to resume his duties. . . .

This provision, by itself, does not resolve the situation in question, because it applies only to the treasurer's temporary inability to act, for reasons such as illness or other disability, in contrast to a permanent vacancy due to death, removal, or resignation. See, *Opinion of the Justices,* 275 Mass. 575, 578 (1931), and G.L. c.54, §143. Thus Mr. McLellan could not become Acting County Treasurer of Plymouth County by virtue of G.L. c.35, §2.

When a vacancy occurs in the office of county treasurer as by death of the incumbent, there shall be an election of a new county treasurer at the next biennial state election.[1] In the interim, the County Commissioners may appoint a person to fill the office, pursuant to G.L. c.54, §143, which states, in pertinent part, as follows:

> . . . Upon a vacancy by removal or otherwise in the office of county treasurer . . . in a county or district, except in Suffolk and Nantucket counties, the county commissioners shall . . . issue precepts for an election to fill such vacancy at the next biennial state election for which precepts can be seasonable issued, unless the term of the office expires on the first Wednesday of January following such state election, and may appoint some person to fill such office until a person is elected thereto and qualified. . . .

Your letter correctly states that, under this statute, the county commissioners have the authority to appoint an acting or interim treasurer until a new treasurer is elected and qualified. However, the statute does not require the commissioners to exercise this authority, but says they "may" do so. The word "may . . . is a word of permission and not of command," *Brennan* v. *Election Commissioners of Boston,* 310 Mass. 784, 786 (1942), and should be construed "according to the common and approved usage of the language," G.L. c.4, §6. Thus the Plymouth County Commissioners could properly choose not to appoint a County Treasurer to fill the vacancy until the office is filled after an election. According to your letter and its attachments, it appears that, in fact, they did not fill the office by any separate and express act of appointment.

[1]Notice of the vacancy must be given to the state secretary by the county commissioners. G.L. c.54, §146.

The absence of an express appointment does not, however, necessarily invalidate the acts of Mr. McLellan as County Treasurer, because the County Commissioners can lawfully appoint him by implication to that office. In that regard, I note that the Plymouth County Commissioners, by Arthur T. Murphy, their Clerk, have "certified" that John F. McLellan "holds the Office of the Acting Treasurer" and "that he is acting in accordance with" G.L. c.35, §2. In addition, at a regular meeting of the Commissioners on April 27, 1976, it was voted to authorize "John F. McLellan, as he is Acting County Treasurer, . . . to borrow the sum of $29,000.00 on the credit of the County, . . . giving therefor County of Plymouth Emergency Loan Note or Notes . . ." Likewise, a majority of the Commissioners countersigned an "Emergency Loan Note" to borrow $29,000.00, which bore the signature of John F. McLellan, and which had to be signed by the county treasurer pursuant to G.L. c.35, §§36A and 39B.

The aforestated actions by the County Commissioners reveal their intention to have John F. McLellan perform the duties of office of County Treasurer until a successor is appointed. These actions appear to constitute implied appointment of Mr. McLellan to that office, in the absence of any express vote by the Commissioners to make such an appointment. Since the Commissioners are not required to make an express appointment under G.L. c.54, §143, or any other statute, the implied appointment of Mr. McLellan reflected in the acts of the Plymouth County Commissioners described above is valid. See, *Hubert v. Mendheim,* 30 P. 633, 634-35, 64 Cal. 213 (1883).

I note further that the appointment of Mr. McLellan, although implied, is nonetheless consistent with public policy, which requires than an interim appointment to fill a vacancy in an elected office be made by officials who are themselves elected. The Legislature has so provided in G.L. c.54, §143.[2] Because the County Commissioners are elected pursuant to G.L. c.34, §4, the public interest has been satisfied by the practice of the Plymouth County Commissioners in this matter.

Even if Mr. McLellan were to be deemed not to have been validly appointed by the county commissioners, he must nonetheless be considered the *de facto* county treasurer, since he has been performing the duties of that office. *Commonwealth v. Wotton,* 201 Mass. 81, 85 (1909). The due authority of an officer who is acting *de facto* may be inferred in the absence of evidence of usurpation of office. *Damon v. Carroll,* 163 Mass. 404, 409 (1895); *cf., Bucknam v. Ruggles,* 15 Mass. 180, 182 (1818).

III. Certification by the Director of Accounts

For the reasons stated in my answers to your first and second questions, it is my conclusion that John F. McLellan is the duly authorized Treasurer of Plymouth County, in accordance with G.L. c.35, §39B, so that the Director of Accounts may properly certify that the note in question was signed by a person qualified as such, under the statute.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

[2]For similar provision for filling vacancies in other offices, see G L. c.54, §§138, 139, 142, 144

Number 74 June 16, 1976
Owen L. Clarke
Commissioner of Corporations
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Commissioner Clarke:

You have requested my opinion as to the appropriateness of certain expenditures presently being made by at least one County Treasurer. You have stated that the Director of Accounts within the Department of Corporations and Taxation, who has certain responsibilities with respect to County expenditures pursuant to G.L. c. 14, §1 and G.L. c. 35, §50, and the members of the County Personnel Board are in agreement that these expenditures are not being made in conformance with G.L. c. 35, §48 *et. seq.* I read your request as asking two separate questions, which I will restate as follows:

1. Are employees hired by a County Treasurer for the purpose of administering a County Retirement system and paid out of the Retirement System Expense Fund subject to the classification and allocation requirements of G.L. c. 35, §49?
2. May County Treasurers receive compensation in addition to their regular salary out of the Expense Fund of the Retirement System without approval of the County Personnel Board?

Initially, I must consider whether it is appropriate for me to address the merits of your request. G.L. c. 12, §3 provides that the Attorney General shall render all legal services required by state "departments, officers, [and] commissions" relating to their official duties. Your request on behalf of the Director of Accounts concerns itself, at least in part, with the duties of the members of the County Personnel Board. I have serious doubts as to whether the County Personnel Board is a state department. See, e.g., 1926 Op. Atty. Gen. p. 125, 1917 Op. Atty. Gen. p. 9, 12. However, since your request is on behalf of the Director of Accounts, who has statutory duties with respect to such Boards[1] and who clearly is within a state department, it is not necessary that I resolve the question of whether the County Personnel Board is a state department. But, I wish to emphasize that my opinion is related solely to the responsibilities of the Director of Accounts and only insofar as he has certain responsibilities for reviewing county budgetary matters pursuant to G.L. c. 14, §1 and G.L. c. 35, §50.

Your first question directs my attention to G.L. c. 35, §49. Section 49 provides, in part, as follows:

> Every office and position whereof the salary is wholly payable from the treasury of one or more counties, or from funds administered by and through county officials, . . . shall be classified by the board in the manner provided by sections forty-eight to fifty-six, inclusive, and every such office and position, now existing or hereafter established, shall be allocated by the board to its proper place in such classification.

[1] G.L. c. 35, §50.

You have informed me that despite that language of Section 49, at least one County Treasurer has hired employees to work for the County Retirement System without regard to the classification and allocation procedure established by Section 49. You have further stated that it is your understanding that the County Treasurer in question has followed this course of conduct in reliance upon the following statutory language appearing in G.L. c. 32, §20 (3) (d):

> The county treasurer shall employ such clerical and other assistants as may be required to transact the business of such system.

The primary motive underlying the legislative enactment of G.L. c. 35, §§48-56 was to bring about uniformity and order among county positions and salaries. *Dolan v. Suffolk County,* 310 Mass. 318 (1941). Cf. *Johnson v. District Attorney for the Northern District,* 342 Mass. 212 (1961).

In those instances where the legislature has determined that certain positions should be exempt from the classification and allocation system, the legislature enacted specific exemptions. G. L. c. 35, §49. There is no specific exemption for employees of the County Retirement System. Similarly, the language of G. L. c. 32, §20(3) (d) to which you refer relates only to the authority of the County Treasurer as an *ex officio* member of the County Retirement Board to hire employees; it does not purport to exempt those employees from the classification and allocation procedure of G.L. c. 35, §49. Since you have indicated that these employees are paid out of funds "administered by and through county officials," it is my view that these employees fall within the purview of G.L. c. 35, §49 and should be classified by the Director of Accounts and the County Personnel Board.

Your second question directs my attention to G.L. c. 32, §20(3) (c) which provides:

> The members of the board of any such county [retirement] system shall serve without compensation but they shall be reimbursed from the expense fund of such system for any expense or loss of salary or wages which they may incur through services on such board. Nothing in this paragraph shall prevent any county treasurer from being compensated for services rendered by him in the active administration of the system in his capacity as county treasurer but not as a member of the board.

You have stated that the County Personnel Board fixes the salary rates for county treasurers, but that certain county treasurers are being paid additional compensation from the Expense Fund of the retirement system without Board approval or sanctions. It is unclear from your request how this particular question relates to the official duties of the Director of Accounts. Any disbursements made to a County Treasurer in the form of salary from the Retirement Expense Fund presumably would not come within the Director of Accounts' review function over accounts of the county treasurer G.L. c. 35, §44. Nevertheless, since the statutory language of G.L. c. 32, §20 (3) (d) appears clear and unambiguous, I will render my opinion as to the meaning of that statute without addressing the question of what authority the Director of Accounts has, if any, to prohibit payments in the form of salary from the Retirement Expense Fund to the County Treasurer.

G.L. c. 32, §20 (3) (c) provides that members of the County Retirement Board "shall serve without compensation but they shall be reimbursed from the expense fund of such system for any expense or loss of salary." The words of a statute must be construed according to common and approved usage of language unless words of technical and precise meaning are employed. *Dexter v. Dexter,* 283 Mass. 327 (1933). Applying this principle of statutory interpretation, it is clear that the Legislature intended that no member of a County Retirement Board, including, the County Treasurer, receive salary or compensation for his services. The subsequent provision with respect to the County Treasurer is simply to insure that the County Treasurer would not forfeit his right to compensation as Treasurer by virtue of his role as an *ex officio* member of the retirement board. Accordingly, it is my opinion that Section 20 (3) (c) does not authorize the payment of additional salary to County Treasurers from the Expense fund for services rendered to the County Retirement Board. The County Treasurer is, of course, entitled to be reimbursed for *expenses* or losses incurred in administering the Retirement system. G.L. c. 32, §20 (3) (c).

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 75 June 16, 1976

Amelia L. Miclette, Chairperson
Civil Service Commission
One Ashburton Place
Boston, Massachusetts 02108

Dear Ms. Miclette:

You have asked whether it would be proper to designate a hearing officer from the Division of Hearings Officers (DHO), which is for organizational purposes considered part of the Executive Office of Administration and Finance, to hear appeals arising under G.L. c. 31, §43(b), particularly where the appeal relates to an action taken by the Executive Office of Administration and Finance. I find that such a designation is permissible.

The Civil Service Commission is authorized by recently enacted legislation to use hearing officers from the Office of Administration and Finance to hear appeals arising under G.L. c. 31, §43(b). St. 1975, c. 681 amending G.L. c. 7, §4H.

The propriety of a hearing officer presiding over an appeal of an action taken by the same department in which he is employed is not a conflict of interest under G.L. c. 268A, since the hearing officer's performance of official duties is not influenced by private financial interests. *See* 1965 Op. Atty. Gen. p. 229 (Chapter 268A is primarily directed toward the conduct of officials and employees as affected by purely private financial interests, not to the financial interest that an employee has in public employment as

such).[1] *See also, Commonwealth* v. *Albert,* 307 Mass. 239, 246 (1940) (in determining whether municipal officer acted in violation of statute barring participation by officer who is "personally interested," the court must construe the words "personally interested" in a pecuniary or proprietary sense); *State ex. rel. Thomson* v. *State Board of Parole,* 342 A.2d 634, 639 (N.H. 1975).

Quite apart from Chapter 268A, however, there is a requirement under G.L. c. 31, §43(b) that a hearing officer be "disinterested."[2] The hearing officer cannot be considered "interested" solely because of the inclusion of DHO within the organizational structure of the Office of Administration and Finance. Instead, the inquiry must focus on whether the structure you describe presents an "unacceptable risk of bias." *Withrow* v. *Larkin,* 421 U.S. 35, 54, 95 S. Ct. 1456, 1468 (1975). In *Withrow,* a challenge was made to the decision of a state medical licensing board which had combined investigative and adjudicative functions. The Supreme Court upheld the board's decision and distinguished the case from the situations where "experience teaches that the probability of actual bias on the part of the judge or decision maker is too high," such as where the "adjudicator has a pecuniary interest in the outcome" or where "he has been the target of personal abuse or criticism from the party before him." *Id.* at 1464. As discussed below, those unique situations similarly do not apply here.

The hearing officer would have no pecuniary interest in the outcome of the hearing itself, since it would not have a direct effect on his private financial interests. *See* Davis, *Administrative Law Text* §12.04 (3d. ed. 1972); *see also Gibson* v. *Berryhill,* 411 U.S. 564, 579 (1973). The Office of Administration and Finance does not control the salaries, rating, or hiring of the hearing officers. The officers all have equal salaries set by the legislature and are not "rated"; in fact, they are hired and fired by the Chief Hearing Officer, not by the Office of Administration and Finance. *See* G.L. c. 7, §4H. An inference that a hearing officer might be indirectly influenced by the fear that a decision adverse to the agency could lead to some type of retribution is too speculative and uncertain. There is a "presumption of honesty and integrity in those serving as adjudicators . . ." *Withrow* v. *Larkin, supra* at 1464.

Also, there is no indication that the hearing officer would be the target of any abuse or criticism directed at him by a party. The fact that the hearing officer may know the parties, as a result of working within the same agency, does not necessarily mean that he is not "disinterested." The standard for determining whether the officer is disinterested looks to the *nature* of the prior personal interaction between the officer and the person or party before him. *See Police Commissioner of Boston* v. *Municipal Court of the West Roxbury District,* 1975 Mass. Adv. Sh. 2598, 332 N.E. 2d 901 (1975). If the circumstances of the prior personal interaction are such that the hearing

[1]Further, the existence of St. 1975, c. 681, would be a statutory provision which takes the hearings officer's official actions outside the scope of c. 268A, since it would be "provided by law." *See,* e.g., G.L. c. 268A, §3.

[2]The requirement of a "disinterested person" is ". . . in turn reflective of the constitutional rights of litigants to a fair hearing, as established in Art. 29 of the Declaration of Rights of the Constitution of the Commonwealth . . . " *Police Commissioner of Boston* v. *Municipal Court of the West Roxbury District,* 1975 Mass. Adv. Sh. 2598, 2606, 332 N.E. 2d 901, 905 (1975). Similarly, a fair trial in a fair tribunal is a basic requirement of due process guaranteed by the United States Constitution. *Withrow* v. *Larkin,* 421 U.S. 35, 46, 95 S. Ct. 1456, 1464 (1975).

officer could be expected to be biased, he is not a "disinterested person." But, mere prior acquaintance is insufficient to support a contention of bias or partiality. *Cf. Police Commissioner of Boston, supra. See also Commonwealth* v. *Leventhal,* 1974 Mass. Adv. Sh. 269, 273, 307 N.E. 2d. 839, 843, (1974) (assertion of bias was found insufficient to disqualify the adjudicatory official where the official was the former teacher of a witness, a fellow member of the bar and an acquaintance); *Frade* v. *Costa,* 342 Mass. 5 (1961) (official, prior to his appointment, had made a campaign contribution to defendant's attorney and was not disqualified). On the other hand, prior involvements found to support an assertion of bias have included a prior acrimonious adversary relationship between the hearing officer and an attorney for one of the parties in the hearing, *Police Commissioner of Boston, supra,* 1975 Mass. Adv. Sh. at 2608-09, and a hearing officer's having been an attorney of record for one of the parties. *Beauregard* v. *Dailey,* 294 Mass. 315, 325 (1936).

I find that the organizational structure you describe does not, on its face, present an "unacceptable risk of bias" and that, therefore, a hearing officer from the Executive Office of Administration and Finance may hear appeals of actions taken by that office. Obviously, my views are based upon the hearing officer's functioning without interference in particular cases; ". . . we should be alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice." *Withrow* v. *Larkin, supra* 1468. It would appear, however, that organizational steps have been taken to minimize the risk of bias.[3] *Cf. id.* at 1468, n. 20.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 76 June 24, 1976
Jonathan E. Fielding, M.D.
Commissioner of Public Health
600 Washington Street
Boston, MA 02133

Dear Commissioner Fielding:

You have requested my opinion concerning the proper interpretation of the phrase "transfer of ownership", as appearing in the second paragraph of G.L. c. 111, §71. Particularly, you have asked whether the Department's practice of treating mortgage foreclosures or a landlord taking possession at the end of a lease as a "transfer of ownership" under the second paragraph of G.L. c. 111, §71, is permissible under the statute read as a whole, including in particular the 18th paragraph of the section. I conclude, for the reasons discussed below, that the Department's practice is proper.

[3]For example, the Regulations of the Division of Hearing Officers forbid any *ex parte* communications between any person or party and an officer regarding any matter at issue in an appeal. See Rules of Practice and Procedure, Division of Hearing Officers, Rule 2.10. Thus, assuming no prior personal involvement that would cause bias, the officer would seem to be insulated from any potential extrajudicial influence by either the employee or the Executive Office of Administration and Finance.

The second paragraph of G.L. c. 111, §71 provides:

> In the case of the transfer of ownership of a convalescent or nursing home, infirmary maintained in a town, rest home or charitable home for the aged, the application of the new owner for a license shall have the effect of a license for a period of three months when filed with the department.

The eighteenth paragraph of G.L. c. 111, §71, provides:

> For the purposes of this section "changes in ownership" of a convalescent or nursing home infirmary, rest home or charitable home for the aged shall, in the case of a corporation, mean transfer of a majority of the stock thereof, and in all other cases, a transfer of a majority interest therein.

I understand from your request that one of the parties in a licensing dispute presently before your Department contends that the eighteenth paragraph of G.L. c. 111, §71 limits, in cases involving corporations, the right set forth in paragraph 2 of G.L. c. 111, §71 of obtaining a three month extension of a license to situations in which there has been 51% stock transfer.

I conclude that paragraph eighteen's definition of "changes of ownership" does not apply to the second paragraph. Paragraph 18 defines "changes in ownership", while paragraph 2 deals with a "transfer of ownership". The term "change in ownership" or "change of ownership" also appears in paragraphs 12 and 15 of Section 71. The term "transfer of ownership" also appears in paragraph 3 of Section 71. As a rule of construction, differences in language within statutory provisions should not lightly be held to have been overlooked in legislation. *City Bank & Trust Co. v. Board of Bank Incorp.,* 346 Mass. 29 (1963). "[T]he very use of two separate words is an indication . . . of some sort of different meaning to be ascribed to each of them . . ." *Hoffman v. Joint Council of Teamsters No. 38,* 230 F.Supp. 684, 691 (N.D. Cal., 1962). Thus, I conclude that the use of the term "changes in ownership" in paragraph 18 was deliberate and was not meant to apply to the term "transfer of ownership" in paragraph 2.

To declare that paragraph 2 did not encompass mortgage foreclosures or a landlord taking possession at the end of a lease would lead to illogical results. If a transferee of assets is denied "transfer of ownership" status, in situations where a stock transfer is not desirable or possible, there may very well be patients shuffled around by transferees who will not be allowed to operate a home while they are waiting for approval of a license for a facility that had previously been approved. The Department's construction of paragraph 2 is the only construction which makes that clause as a whole "an effective piece of legislation in harmony with common sense and sound judgment". *Tilton v. City of Haverhill,* 311 Mass. 571, 577-578 (1972). Accord, *Mass. Mut. Life Ins. Co. v. Commissioner of Corporations and Taxation,* 1973 Mass. Adv. Sh. 863.

Such a result is compatible with the history of the dispute you mention in your letter, when the whole transaction is viewed as an integrated method of financing with provision for asset recapture, via non-renewal of the lease, opposed to a method of pledge of corporate stock and foreclosure.

Therefore, I conclude that the Department's practice as described in your letter is proper and answer your question in the affirmative.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 77 June 28, 1976

Mr. Laurence D. Fitzmaurice
Comptroller
Executive Office for Administration and Finance
One Ashburton Place
Boston, MA 02108

Dear Mr. Fitzmaurice:

You have requested my opinion as to the method to be used in computing the compensation to be paid to former state employees who, while receiving a pension, have returned to active state service. In your request you direct my attention to G.L. c. 32, §91, as amended, and ask me to resolve a question of statutory construction. Reduced to its simplest terms, your question is whether the word "salary" as used in that statute denotes a weekly or an annual amount of compensation.[1] For the reasons articulated below, I advise you to compute compensation based on annual rather than weekly salary and pension figures.

In your letter of transmittal you state that "this is the third time this question has been officially presented to the office of the Attorney General". In an opinion dated January 10, 1969, one former Attorney General responded to the question by concluding that a "re-employed employee is entitled to only that portion of the full *weekly* salary of the position in which he is re-employed which when added to his pension, calculated on a similar basis, will equal the salary, similarly calculated, currently being paid for his former position." 1969 Op. Atty. Gen. pp. 92-93 (emphasis added). That opinion expressly rejected a construction of G.L. c. 32, §91 which would have required computation based on annual pension and salary figures.

On March 5, 1973 my immediate predecessor reviewed and reversed the ruling incorporated in the earlier opinion. I will neither summarize nor repeat my predecessor's reasoning; I merely restate his conclusion. The appropriate formula for computing compensation to a reactivated state employee is that which "entitles the employee to the full weekly salary of the position in which he is re-employed until he has received an aggregate amount which, when added to his *annual* pension, will equal the *annual* salary being paid for his former position. 1972-73 Op. Atty. Gen (March 5, 1973) (emphasis in original).

[1]You ask me to interpret G.L. c. 32, §91 (b) which reads, *inter alia:* ". . . provided, that the earnings [from re-employment] when added to any pension or retirement allowance [the individual] is receiving do not exceed the salary that is being paid for the position from which he has retired or in which his employment was terminated."

The object of all statutory construction is to ascertain the true intent of the General Court from the words used. *Lehan v. North Main Street Garage,* 312 Mass. 547 (1943). When a statute is re-enacted without material change by the Legislature after its terms have been judicially construed, the Legislature is originally presumed to have adopted the judicial construction placed upon those words. *Bursey's Case,* 325 Mass. 702 (1950); *Hertrais v. Moore,* 325 Mass. 57 (1949). I believe a similar presumption to be in order when the words of a statute have been the subject of a formal Opinion of the Attorney General.

The proviso which you call upon me to construe was amended by St. 1973, c. 587. The house bill which resulted in the amendment was referred in the Senate to the Committee on Ways and Means on March 15, 1973, just ten days after the opinion of my predecessor was rendered. It was engrossed in the Senate on May 2 and in the House on July 19 and signed by the Governor on August 6, 1973. The amendment clarified the pre-existing proviso. As amended, the law permits reactivated state employees to work ninety days or seven hundred twenty hours, thus eliminating potential ambiguity as to the amount of time such an individual may serve. Significantly, the General Court did not alter the manner in which the word salary was used. I am of the opinion that in re-enacting G.L. c. 32, §91 without such change, the General Court adopted my predecessor's construction of the word "salary".

Even if there had not been a re-enactment of the law, I would not be inclined to reverse the previous opinion in this case. While an opinion of the Attorney General is not the equivalent of a judicial determination, I nevertheless find it generally inappropriate to reconsider a legal question which has already been decided by the proper official. It is, of course, true that there may be circumstances in which it is necessary to reconsider an opinion erroneously or improvidently rendered. In this case, however, the previous opinion was based on all known relevant considerations and appears to have been a proper exercise of the advisory powers of the Attorney General. Thus, your request does not present an occasion requiring the reversal of a prior opinion.

Accordingly, following the guidelines established in the Opinion of March 5, 1973, an individual receiving a salary of $403.95 per week and a pension of $177.58 per week would receive the sum of the two, namely $581.53 per week "until he has received an aggregate amount which . . . will equal the *annual* salary currently being paid for his former position."

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

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